MISSISSIPPI LAW JOURNAL

ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED" DUE PROCESS

Parham H. Williams, Jr., Roy C. Williams, and *Frank S. Thackston, Jr.*

MECHANICS' LIENS: MISSISSIPPPI NOTICE REQUIREMENTS

James M. Brown

SYMPOSIUM: SOUTHERN JUSTICE

RULES OF THE SUPREME COURT OF MISSISSIPPI, AS AMENDED

May 1966

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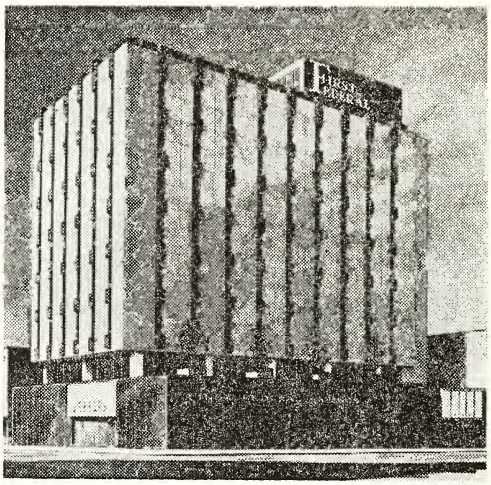

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THE CRIMINAL VERSUS SOCIETY: SOME OBSERVATIONS ON THE ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED" DUE PROCESS†

*Parham H. Williams, Jr.,**
*Roy C. Williams,*** and *Frank S. Thackston, Jr.****

"The history of liberty has largely been the history of observance of procedural safeguards."

Mr. Justice Frankfurter,
McNabb v. United States,
318 U.S. 332, 347 (1942)

Introduction

As the population of the United States expands at an approximate rate of one and one-half per cent per year,[1] the consequent growth in social interactions renders it increasingly difficult for Americans to live together harmoniously. Dramatic indicia of rising social conflicts are the soaring crime rates recorded each year. Total crimes committed per 100,000 population increased from 925.9 in 1958 to 1,198.3 in 1963;[2] and

†This article will be continued in December 1966.

*Professor of Law, University of Mississippi.

**Member of the Editorial Board, Mississippi Law Journal

***Member of the Staff, Mississippi Law Journal.

[1]U.S. Bureau of the Census, Statistical Abstract of the United States 11 (86th ed. 1965).

[2]*Id.* at 146. The total number of crimes committed per hundred thousand of population between 1958 and 1963 are:

1958	925.9
1959	921.4
1960	1038.7
1961	1052.8
1962	1103.5
1963	1198.3

urban crimes known to the police mushroomed a startling 22.7 per cent from 1958 to 1963.[3] With the number of criminal offenses increasing six times as fast as the population, there is justification for inquiry about the effectiveness of law enforcement in this country. Police officials respond to such inquiries with the frank—and sometimes bitter—reply that recent United States Supreme Court decisions in the area of criminal law have hamstrung effective criminal investigation. "If this court trend continues, a collapse in morale of law enforcement officers is possible from coast to coast, north to south," says Chief W. C. Burnley of the Greenville, Mississippi, Police Department in a typical statement. "On the one hand we have the President announcing steps to reduce crime. But on the other, we have the courts turning criminals free on technicalities."[4]

These "technicalities" that disturb Chief Burnley and other law enforcement officials are the extension by the Court of the fourteenth

---

[3]*Id.* at 146-47. The statistics as to various felonies are:

Urban crimes known to police	*1958-62 average*	*1963*	*% change*
Murder & manslaughter	4,170	4,666	11.9
Forcible rape	8,097	8,904	10.0
Robbery	55,178	65,913	19.5
Aggravated assault	80,853	94,943	17.4
Burglary	502,250	617,517	23.0
Auto theft	222,759	280,870	26.1
Larceny	1,284,564	1,575,139	22.6
Total	2,160,622	2,651,045	22.7

Also interesting is a breakdown of offenses per hundred thousand population between Mississippi and the United States generally for the years 1962 and 1963:

	Mississippi		*United States*	
Crime	*1962*	*1963*	*1962*	*1963*
Murder & Manslaughter	7.3	7.2	4.5	4.5
Forcible rape	4.3	4.3	8.8	8.7
Robbery	8.0	8.3	51.3	53.1
Aggravated assault	66.2	52.5	75.1	78.4
Burglary	227.5	186.0	480.4	517.6
Larceny	78.2	85.8	290.5	324.3
Auto theft	58.9	49.2	192.9	211.6

[4]Interview with Chief W. C. Burnley, Greenville, Mississippi Police Department reported in *The Commercial Appeal*, March 31, 1966, p. 59. In this interview, Chief Burnley hints darkly that United States Supreme Court decisions restricting criminal investigators may hand the Ku Klux Klan a key to unprecedented power in the South. He charges that the Court's emphasis on rights of individual suspects and de-emphasis of community rights have neutralized effectiveness of law enforcement and are paving the way for emergence of the Klan as "an illicit police force, uninhibited and undesirable." The Chief said that he has received word on several occasions from the Ku Klux Klan that its forces are standing by for that time when there is a breakdown in law enforcement.

amendment "due process clause" to (a) require the states to provide counsel for all indigent persons charged with a felony;[5] (b) prohibit the admission at trial of illegally obtained evidence;[6] (c) prohibit the use at trial of "coerced" confessions;[7] and (d) prohibit the use at trial of confessions obtained through the interrogation of subjects who have requested and been denied an opportunity to consult with counsel.[8] Although the issue was effectively settled in 1789 with the ratification of the Constitution, the power and willingness of the United States Supreme Court to review and overturn state court criminal convictions remains an additional offending thorn in the side of many state law enforcement officials.

It is not the purpose of this article to treat indecently the long moldering corpse of anti-Federalism; rather we posit as a basic assumption the proposition that there must be a uniform national standard of criminal procedure in the United States. As corroborants of this proposition, we cite no sociological commentators or contemporary political scientists. Instead, as is fashionable today whenever perplexing constitutional questions arise (and many not so perplexing), we refer to the intent and motives of those charismatic visionaries—the "Framers" of the American Constitution—and readily find corroboration for our proposition of national uniformity in criminal procedure.

Recent studies[9] of the great struggle between the Federalists and anti-Federalists over the nature and adoption of the Constitution present persuasive evidence that the intent of those who finally prevailed was that the federal judiciary should impose uniformity among the state judiciaries. A manifestation of this intent was the statement of Edmund Randolph of Virginia—made openly on the Convention floor in the

---

[5]Gideon v. Wainwright, 372 U.S. 335 (1963).

[6]Mapp v. Ohio, 367 U.S. 643 (1961). *Mapp,* however, certainly should not have disturbed Chief Burnley or other Mississippi law enforcement officials, since Mississippi adopted the federal exclusionary rule in 1922. Tucker v. State, 128 Miss. 216, 90 So. 845 (1922).

[7]Rogers v. Richmond, 365 U.S. 534 (1961) (in which defendant was interrogated for eight hours and then confessed after police chief pretended to place a telephone call to other officers to bring in defendant's wife for questioning); Haynes v. Washington, 373 U.S. 503 (1963) (wherein defendant was held incommunicado for sixteen hours before confessing).

[8]Escobedo v. Illinois, 378 U.S. 478 (1964).

[9]See generally Murphy, *State Sovereignty Prior to the Constitution,* 29 Miss. L.J. 115 (1958); *State Sovereignty and the Founding Fathers,* 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959); 31 Miss. L.J. 50 (1959); *State Sovereignty and the Drafting of the Constitution,* 31 Miss. L.J. 203 (1960); 32 Miss. L.J. 1 (1960); 32 Miss. L.J. 155 (1961); 32 Miss. L.J. 227 (1961); *State Sovereignty and the Ratification of the Constitution,* 33 Miss. L.J. 29 (1961); 33 Miss. L.J. 164 (1962); 33 Miss. L.J. 292 (1962); *State Sovereignty and the Constitution—A Summary View,* 33 Miss. L.J. 353 (1962).

course of the debate concerning the appellate jurisdiction of the Supreme Court over state courts—that "the courts of the states cannot be trusted" since the national policy and the state policy would frequently be "at variance."[10] The Framers' intent was more explicitly revealed in the essays published in the New York press during the ratification campaign. Writing under the pseudonym of Publius, Alexander Hamilton defended the federal judicial power granted by article III of the proposed Constitution and convincingly argued the necessity of establishing one supreme tribunal with authority finally to settle and declare uniform rules:

> This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals (state courts) are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from differences of opinion there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations.[11]
>
> Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings.[12]
>
> The mere necessity of uniformity in the interpretation of the national laws decides the question (of the federal judiciary being empowered to interpret the Constitution). Thirteen independent courts of final jurisdiction over the same cases, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[13]

And finally, in one of the last numbers of *The Federalist*, Hamilton, with prophetic vision, foresaw the role that the United States Supreme Court must perform in establishing uniformity of procedural rules throughout the nation:

> [T]he national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally be to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.[14]

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[10] 2 FERRAND, THE RECORD OF THE FEDERAL CONVENTION 46 (rev. ed 1937).

[11] THE FEDERALIST No. 22, at 133 (Lodge ed. 1888) (Hamilton).

[12] THE FEDERALIST No. 83, at 358 (Beard ed. 1948) (Hamilton).

[13] THE FEDERALIST No. 80, at 341 (Beard ed. 1948) (Hamilton).

[14] THE FEDERALIST No. 82, at 355 (Beard ed. 1948) (Hamilton). Hamilton also makes a foreign policy argument for control and regulation of the state judiciaries by the Supreme Court: "The faith, the reputation, the peace of the whole union,

For those yet unconvinced, the rationale for the grant of this power by the several states to the United States Supreme Court is eloquently and effectively stated by George Washington, President of the Constitutional Convention, in his letter covering the transmittal of the new document to the Congress:

> It is obviously impracticable in the Federal Government of these States to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all.
>
> In our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety—perhaps our national existence.[15]

Resting our case on the briefs of the Founding Fathers, we conclude that there must be a uniform national standard of criminal procedure in the United States. That the Supreme Court is the arbiter of these standards is, of course, not a debatable proposition. That the Supreme Court should be the *formulator* of these standards, however, is indeed an arguable issue. In a recent article tantalizingly entitled "Policing the Police: Nine Men Are Not Enough,"[16] Professor Herbert L. Packer argues that the Supreme Court is not equipped to formulate rules of police conduct and procedure:

> The role (of formulator of rules) has not been a comfortable one, either for the Court or for the police. The Supreme Court is not in the business of running police departments. It has no direct disciplinary powers over the police. . . . Its sole occasion for dealing with police conduct comes when it reviews state criminal convictions in which questions have been raised about the admissibility under Fourteenth Amendment standards of evidence obtained by the police in asserted violation of those standards. It cannot discipline the offending police officer; it cannot direct his superiors to discontinue the illegal search or the third degree interrogation; it can only set aside the conviction so obtained and hope that both its action and the expression of its disapproval will have some exemplary effect on the police.
>
> This much is generally recognized. But the problem cuts deeper. The Court deals with the unique facts of a case at hand. It has no fact-finding facilities. . . . It cannot independently inform itself about the dimensions of the general law enforcement problem, or identify and choose among the range

---

are thus continually at the mercy of the prejudices, the passions and the interests of (the state courts). Is it possible that foreign nations can either respect or confide in such a government?" THE FEDERALIST No. 22, at 134 (Lodge ed. 1888) (Hamilton).

[15] I ANNALS OF CONG. vii (1834).

[16] The New Republic, Sept. 4, 1965, p. 17.

of particularized solutions that may be available. The Court moves with greatest assurance when it looks at a particular case and concludes that there has been a particular injustice which it should right. It moves with unease when it tries to frame a general standard for police conduct. It is one thing to say: This defendant's confession was illegally coerced because he was illiterate, unadvised of his rights, held incommunicado, subjected to threats, beaten, or whatever. It is quite another to say: No person who is arrested may be questioned by the police until he has been advised of his right to remain silent and to have the assistance of a lawyer if he wants to. And yet it is this second kind of statement (although not, as yet, this particular one) to which the Court has been resorting with increasing frequency in the last few years.

It is not hard to see why. There has been a law-making vacuum into which the Court has, willy-nilly, had to rush. We have no detailed codes of police practices. Our law-making bodies, federal, state, and local, have so far defaulted on that job. The Court has sought to influence police behavior by dealing, in its traditional way, with specific cases. But the gap has been too great to bridge in its traditional way. And so the movement has been to ever-increasing generality of statement: from *this* confession was coerced for the following reasons unique to this case, to *all* confessions are bad when they are obtained from an arrestee who has not been promptly brought before a magistrate, as in the famous *Mallory* rule announced for the federal criminal courts in 1957 . . . .

Moves of this sort (*Mallory, Mapp,* and *Escobedo*) by the Supreme Court are moves of desperation. Nobody else is policing the police, so the Justices think that they must. But they can only do so vis-a-vis the states in the discharge of their duty to construe the Constitution in cases that come before them. And so, the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through an awkward and inept process: the rules become 'constitutionalized.'

If one takes an Olympian view of the relation among law-making institutions, it is clear that the Court is moving outside the area in which it functions most appropriately. Yet it is naive or disingenuous to expect the Court to hold its hand when its hand is the only one raised or raisable. Which brings us back to the initial question, the frequently voiced question, the wrong question: Can the police operate under the rules that the courts are laying down for their governance? A better question would be: To whom can we look for the the establishment of rules and sanctions to regulate the conduct of the police in a free society?[17]

It seems obvious that the answer to Professor Packer's "better

[17] *Id.* at 18-19.

question" is: The legislatures of the several states. Only the legislature possesses the flexibility, the fact-finding machinery, and the intimate rapport with the problems of local law enforcement agencies which are essential to the drafting of adequate rules of criminal procedure. By "adequate rules," we mean rules that reflect the *genuine* expectations of the community—expectations that society will be protected from the depredations of the criminal and that the individual will be guaranteed the rights of "due process" and of "equal protection of the laws" against arbitrary state action. These expectations are by no means incompatible, and they can be translated into procedural codes that are fair and effective. The danger is that the legislature, which is the best equipped branch of government to make the translation, will default on that job, and that the courts, which are the least equipped to lay down broad rules of procedure, will of necessity act. The professed burden of this article, then, is (a) to illuminate areas of our criminal procedure which, viewed in light of the recent Supreme Court decisions, most urgently call for reform, and (b) to suggest methods of reform that will accomplish the desired objectives of safeguarding individual rights of "due process" and "equal protection of the laws," while conjunctively insuring the effectiveness of law enforcement.

The areas to be considered include the arrest procedure and its consequent problems revolving about police interrogation of the arrestee; the complex of problems emanating from the right-to-counsel decisions; the procedure for determining indigency; the practical problem of supplying counsel to represent indigents; the entitlement of indigents to release from jail on bail; the necessity for comprehensive pre-sentence investigations; and procedures for providing adequate post-conviction remedies. The focus of these comments will be on Mississippi procedures and the reforms necessary to accommodate our procedures to the rapidly developing federal standards.

Part I: The Arrest Power

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."[18]

"The people shall be secure in their persons . . . from unreasonable seizure or search . . . ."[19]

A. The Power to Arrest Under Authority of a Warrant

Generally, an arrest may be made with or without a warrant. Until

[18]U.S. Const. amend. IV.

[19]Miss. Const. art. III, § 23.

recently, the procedure of arresting under the authority of a warrant has presented few problems. In most jurisdictions, including Mississippi,[20] the process is begun by the filing of a sworn affidavit with a magistrate. The affidavit must allege facts constituting "probable cause" to believe that an individual has committed a particular crime. Although in theory the magistrate hears the testimony of the complaining witness and determines that such testimony does in fact constitute "probable cause" to issue an arrest warrant, in practice the magistrate invariably issues the warrant without any sort of evidential hearing. This "rubber stamping" of police requests for warrants emasculates the fourth amendment guarantee that arrest warrants shall not be issued except upon probable cause, supported by oath or affirmation. The purpose of this guarantee is not to insure persons against *any* search or seizure, but against *unreasonable* search or seizure. Theoretically at least, the "reasonableness" of an arrest under a warrant is insured by the requirement that the evidence of the complaining witnesses be examined by a disinterested judicial officer who must be satisfied that such evidence constitutes probable cause before issuing a warrant. As Mr. Justice Jackson pointed out in *Johnson v. United States*:[21]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[22]

In order that such inferences may be intelligently and fairly drawn, it is necessary that the complainant's affidavit allege more than the skeletal facts required by the procedural statutes of most jurisdictions.[23] A typical example of a "skeleton affidavit" was the basis of a narcotics prosecution in *Giordenello v. United States*.[24] After finding that the complaining officer relied exclusively upon hearsay information rather than upon personal knowledge in executing the affidavit, the Court said:

> The language of the Fourth Amendment, that '. . . no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or

---

[20]Miss. Code Ann. § 2598 (1956).
[21]333 U.S. 10 (1948).
[22]*Id.* at 13-14.
[23]See, *e.g.*, Miss. Code Ann. § 2598 (1956).
[24]357 U.S. 480 (1958).

> things to be seized,' of course applies to arrest as well as search warrants . . . . The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.
>
> When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster . . . . The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.[25]

In holding the arrest in *Giordenello* to have been illegal, the Court dispelled any doubts that arrest affidavits and warrants would be judged by the same high standards as those relating to searches.[26] The rule in *Giordenello* recently was reaffirmed in *Jaben v. United States*,[27] wherein the affidavit spelled out in detail the sources of the affiant's knowledge concerning the guilt of Jaben. Finding the *Jaben* affidavit to be a valid one, the Court said:

> *Giordenello v. United States* . . . and *Aguilar v. Texas* . . . established that a magistrate is intended to make a neutral judgment that resort to further criminal process is justified. A complaint must provide a foundation for that judgment. It must provide the affiant's answer to the magistrate's hypothetical question, 'What makes you think that the defendant committed the offense charged?'[28]

Although *Giordenello* and *Jaben* were both federal prosecutions and involved affidavits and warrants issued pursuant to the Federal Rules of Criminal Procedure, it seems clear that the fourth amendment standards of reasonableness are enforceable against the states through the fourteenth amendment in procedures relating to arrests as well as in those relating to searches.[29] And the Mississippi Supreme Court, in *O'Bean v. State*,[30] has made it equally clear that it will strictly apply federal standards in determining probable cause. In *O'Bean*, the

---

[25] *Id.* at 485, 486.

[26] For a discussion of these standards, see Jones v. United States, 362 U.S. 257 (1960); Marron v. United States, 275 U.S. 192 (1927).

[27] 381 U.S. 214 (1965).

[28] *Id.* at 224.

[29] For a discussion of standards of reasonableness relating to searches, see Ker v. California, 374 U.S. 23 (1963).

[30] 184 So. 2d 635 (Miss. 1966).

defendant was convicted of possession of intoxicating liquor. Her assignment of error on appeal was that the affidavit praying the issuance of the search warrant did not allege any facts or circumstances from which a neutral and detached magistrate could find probable cause for the warrant to issue.[31] In considering the case our court said:

> Some years ago the Fourth Amendment standards of the Federal Constitution were not required to be followed by the state courts and were in fact not followed by this Court as illustrated by the case of *Nash v. State*, 171 Miss. 279, 157 So. 365 (1934), wherein we held, in dealing with a similar situation, the following:
>
> 'The provisions of the Fourth Amendment to the Federal Constitution against unreasonable searches and seizures have no application to state proceedings. . . .'
>
> However, the former day is gone and we are constrained to follow the decisions of our highest court in regard to the standard that must be applied by the state courts in determining probable cause, as in *Ker v. California* . . . .[32]

The court then turned to a consideration of the standards enunciated in *Aguilar v. Texas*,[33] in which the United States Supreme Court held that a similar affidavit was fatally defective because it did not contain sufficient facts to enable the magistrate to determine the existence of probable cause. Applying the *Aguilar* standards to *O'Bean*, our court held:

> The affidavit requesting the search warrant here similarly does not allege any facts or circumstances from which the officer could judicially ascertain or determine probable cause. It sets forth nothing more than the mere conclusion of the affiant founded upon information obtained from an unknown creditable person. The affidavit does not, therefore, attain the standard required by the Fourth Amendment as defined in *Aguilar*, nor does it attain the standards imposed on this Court by that case, the same now being synonomous.
>
> The State argues, however, that the words in the warrant, 'and also after having heard and considered evidence in support thereof . . .', when used in conjunction with the affidavit, ascend to the requirements of the Fourth Amendment. This argument is most persuasive as we are aware of the numerous

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[31]The pertinent parts of the affidavit provided: "This day S. N. Massey, Police Officer, came and personally appeared before the undersigned . . . Ex-officio Justice of the Peace . . . and makes oath that he has reason to believe, and does believe, that intoxicating liquors are being . . . sold . . . and this belief is not feigned or malice (*sic*) against the said occupants but is founded on creditable information in that the affiant has been informed by a creditable person that such is a fact . . . ." O'Bean v. State, 184 So. 2d 635, 637 (Miss. 1966).

[32]*Id.* at 636-37.

[33]378 U.S. 108 (1964).

> decisions of this Court upholding similar affidavits and warrants; however, we resist the argument, as the words of the warrant 'considered evidence,' as did those of the affidavit, fail to portray any of the underlying facts or circumstances upon which a judicial determination could be made as to whether probable cause existed.
>
> The standard required by *Aguilar*, which we are obliged to follow is that an affidavit seeking a search warrant, though it may be based on hearsay information and need not reflect the direct personal observations of the affiant, must contain some of the underlying facts or circumstances from which a detached and neutral judge can fairly ascertain that probable cause does exist for the issuance of the warrant.[34]

The rejection of the *O'Bean* affidavit by our court dramatically serves notice on Mississippi prosecutors and law enforcement officials that affidavits for search warrants must spell out enough of the underlying facts so that the magistrate will be enabled to make an independent and fair determination that probable cause for the issuance of the warrant does exist. It follows logically that the same standards must be applied to affidavits praying for the issuance of arrest warrants.[35]

B. The Power to Arrest Without a Warrant

In considering the power to arrest without the authority of a warrant, it is important to draw a distinction between an arrest for a misdemeanor and an arrest for felony. At common law, an arrest for a misdemeanor could be made without a warrant only when a misdemeanor amounting to a breach of the peace was committed in the presence of the arresting officer.[36] An arrest for a felony, however, could be made whenever the arresting officer had "probable cause to believe that (1) a felony has been committed, and (2) that the person to be arrested is the guilty party."[37] Most of the American jurisdictions have enacted statutes

[34]O'Bean v. State, *supra* note 31, at 638.

[35]The penalty for unlawfully seizing evidence under a defective affidavit for a search warrant is, of course, the exclusion at trial of the evidence so obtained. It may be argued that, since an illegal arrest is no defense to a state or federal prosecution, Frisbie v. Collins, 342 U.S. 519 (1952), it really does not matter whether the affidavit for an arrest warrant is valid or not. Once the police have the suspect in custody, he may be tried regardless of the affidavit's validity. However, as *Giordenello* illustrates, any evidence seized as an incident to an illegal arrest under a defective affidavit is also excludable at the trial. In addition, Wong Sun v. United States, 371 U.S. 471 (1963), recently held that in *federal* prosecutions verbal statements following an unlawful arrest must be excluded as the fruit of police illegality. The per curiam decision in Traub v. Connecticut, 374 U.S. 493 (1963), remanding the case for treatment not inconsistent with *Wong Sun*, apparenty extends the *Wong Sun* rule to the state courts.

[36]Smith v. State, 228 Miss. 476, 87 So. 2d 917 (1956).

[37]Craft v. State, 202 Miss. 43, 49, 30 So. 2d 414, 415-16 (1947).

which are essentially restatements of the common law. The Mississippi statute is typical:[38]

> An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.[39]

It will be noted that this section 2470 is declaratory of the common law of arrest with the exception that the authority to make arrests without a warrant is extended to any indictable offense committed in the presence of the officer whether or not a breach of the peace is involved.[40] An offense is committed "in the presence" of an officer when he then and there acquires knowledge of such commission through one of his senses[41] or from "inferences properly to be drawn from the testimony of the senses."[42] The classic case is *Copeland v. State*,[43] wherein the sheriff testified that as the defendant came toward him his coat blew back and revealed what appeared to be a whiskey bottle in the inside coat pocket. The sheriff also testified that the defendant appeared to be in a drunken condition and that the odor of whiskey was about his person. Reacting to these visual and olfactory stimuli, the sheriff arrested Copeland for the unlawful possession of intoxicating liquor. Although the defendant vigorouly protested that the sheriff did not *know* that the bottle contained whiskey until after the arrest, the court found that "the testimony of the sheriff discloses much more than a mere suspicion on his part that a misdemeanor was being committed in

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[38] *Ibid.*

[39] MISS. CODE ANN. § 2470 (1956); *cf.*, the federal arrest statute: "Agents of the Federal Bureau of Investigation . . . may . . . make arrests without warrant for any offense . . . committed in their presence, or for any felony . . . if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. § 3052 (1952).

[40] Smith v. State, 228 Miss. 476, 87 So. 2d 917 (1956).

[41] Copeland v. State, 202 Miss. 58, 30 So. 2d 509 (1947).

[42] Garske v. United States, 1 F.2d 620, 623 (8th Cir. 1924). However, the arrest must be made as quickly after the commission of the offense as the circumstances will permit. If the officer witnesses the commission of a misdemeanor and departs from the scene without arresting the offender, he cannot later return and make the arrest unless he is then armed with an arrest warrant. Smith v. State, 228 Miss. 476, 87 So. 2d 917 (1956).

[43] 202 Miss. 58, 30 So. 2d 509 (1947).

his presence . . ."[44] and upheld the validity of the arrest.

The real problem area is that in which an arrest is sought to be made for a felony committed outside the presence of the officer.[45] Before an officer may lawfully arrest for such an offense, he must have "probable cause" or "reasonable ground"[46] to believe that two essential elements exist: (a) that a felony has in fact been committed; and (b) that the subject of the arrest is the person who committed the felony. Because of the varying factual situations presented in the cases, the courts have found it difficult to go beyond a general definition of the term "probable cause," usually resorting to such language as: "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[47]

It is helpful, therefore, to seek an understanding of the term within the context of individual cases. In *Beck v. Ohio*,[48] the Supreme Court was confronted with a situation in which police officers, who possessed neither an arrest warrant nor a search warrant, overtook and stopped Beck's car, ordered him out and placed him under arrest. After searching the car and finding nothing, the officers then took Beck to a nearby police station and searched his person. An envelope containing a number of clearing house slips was found in one of the arrestee's socks, and he was then charged with their unlawful possession. Beck moved to suppress as evidence the clearing house slips on the ground that they were seized as an incident of an illegal arrest. The trial court overruled this motion and Beck was convicted. Speaking for the Court, Mr. Justice Stewart said:

> The constitutional validity of the search in this case . . . must depend upon the constitutional validity of the petitioner's arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that

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[44]*Id.* at 61, 30 So. 2d at 510. Other examples of valid arrests for offenses committed in the presence of an officer are: Johnson v. City of Crystal Springs, 218 Miss. 453, 67 So. 2d 465 (1953) (arrest for drunken driving of person whom officer had observed in a drunken condition shortly before); Paramount-Richards Theaters v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950) (arrest for violation of Sunday Blue Laws of operator who showed a movie during the prohibited time in the presence of officers); Kelley v. Yearwood, 204 Miss. 181, 37 So. 2d 174 (1946) (arrest for public drunkenness of an obviously intoxicated woman at the scene of an accident).

[45]Obviously, under § 2470 an officer cannot arrest a person without a warrant for a *misdemeanor* committed outside of his presence. Pettis v. State, 209 Miss. 726, 48 So. 2d 355 (1950).

[46]Miss. Code Ann. § 2470 (1956).

[47]Henry v. United States, 361 U.S. 98, 102 (1959).

[48]379 U.S. 89 (1964).

> moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.[49]

The Court then proceeded to apply this test to the evidence in the record:

> The record is meager, consisting only of the testimony of one of the arresting officers, given at the hearing on the motion to suppress. As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer 'had a police picture of him and knew what he looked like,' and that the officer knew that the petitioner 'had a record in connection with the clearing house and scheme of chance.' Beyond that, the officer testified only that he had 'information,' that he had 'heard reports,' that 'someone specifically did relate that information,' and that he 'knew who that person was.' There is nowhere in the record any indication of what 'information' or 'reports' the officer had received, or, beyond what has been set out above, from what source the 'information' and 'reports' had come. The officer testified that when he left the station house, 'I had in mind looking for (the petitioner) in the area of East 115 Street and Beulah, stopping him if I did see him make a stop in that area.' But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. . . . And the record does not show that the officers saw the petitioner 'stop' before they arrested him, or that they saw, heard, smelled, or otherwise perceived anything else to give them ground for belief that the petitioner had acted or was then acting unlawfully.[50]

Concluding that the evidence in the record did not justify a finding that the officers, at the moment of arrest, had probable cause to arrest Beck, the Court said:

> When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed . . . . If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function. All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that some one (he did not say who) had told him something (he

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[49] *Id.* at 91.

[50] *Id.* at 93-94.

> did not say what) about the petitioner. We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record were either inadmissible or entirely irrelevant upon the issue of probable cause. . . . But to hold that these two facts, alone or in combination, of themselves constituted probable cause would be to hold that anyone with a previous record could be arrested at will.[51]

A second case that will be helpful is *Smith v. State*,[52] a decision well known to all Mississippi prosecutors. The circumstances leading to the arrest are simply that the sheriff was driving his automobile in Hattiesburg around 9:00 p.m. He met another car traveling at a slow speed, stopped, turned around and came up behind it. The driver of the other car motioned the sheriff to come up beside his car, which the sheriff did. However, when the driver saw the sheriff, he drove away rapidly and the sheriff pursued, eventually stopping the car and arresting the driver after a wild, high-speed chase. A subsequent search of the car revealed a quantity of what appeared to be burglary tools and Smith (the driver of the car) was charged with their possession.[53] The Mississippi Supreme Court found the arrest of Smith to have been unlawful, thereby invalidating the search and seizure of the tools. "The evidence in this case discloses that the officer had no reason to believe that the person driving the (car) had committed a felony when he drove up beside the defendant, therefore the sheriff had no duty to make an arrest of the defendant. . . ."[54]

Although the record disclosed that the defendant exceeded the speed limit and ran a number of red lights during the pursuit by the sheriff, the court said that this furnished no basis for an arrest.

> [A]n arrest begins when an officer begins his pursuit for the purpose of making an arrest. If an officer does not have the authority to make an arrest at the instant he begins his pursuit for the purpose of making the arrest, the fact that the person the officer is pursuing violates the traffic law in making his escape does not thereby authorize the arrest that began unlawfully, because an officer who attempts an unlawful arrest cannot later arrest a citizen for resisting such trespass.[55]

Contrasting with *Beck* and *Smith* are the cases of *Draper v. United States*[56] and *Dunning v. State*,[57] decisions in which the factual situa-

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[51] *Id.* at 96-97.

[52] 240 Miss. 738, 128 So. 2d 857 (1961).

[53] An offense made punishable by Miss. Code Ann. § 2044 (1956).

[54] Smith v. State, 240 Miss. 738, 743, 128 So. 2d 857, 859 (1961).

[55] *Id.* at 743-44, 128 So. 2d at 859.

[56] 358 U.S. 307 (1959).

[57] 251 Miss. 766, 171 So. 2d 315 (1965).

tions known to the arresting officers *did* constitute "probable cause" for an arrest. In *Draper* an informant who had given reliable information on numerous previous occasions told the arresting officer that Draper would arrive on a certain train with narcotics in his possession. The informant described Draper's appearance in detail and the officer, who met the train, had no difficulty recognizing him. An arrest was made, followed by an incidental search which revealed the narcotics. In contrast with *Beck,* the officer in *Draper* was informed by a known, reliable source that a described individual would follow a certain route and would be in possession of narcotics. This objective information known to the arresting officer furnished "probable cause" to make the arrest.

In *Dunning,* a robbery victim furnished the police a general description of the robber which included his race, size, approximate age, clothing, and a particular description of the car used to flee the scene. This information was immediately disseminated to the law enforcement officers in the area. A short while later the arresting officer, who had received the descriptive information, observed Dunning walking along the highway about one mile from the point where the police had found the abandoned get-away car. As Dunning's appearance matched the description given the officer, an arrest was promptly made and Dunning was later convicted of the robbery. In rejecting the appellant's contention that the facts and circumstances known to the officer did not constitute probable cause to arrest Dunning, the Mississippi Supreme Court said:

> Officer White was directed by his superior to be on the lookout for a suspect wanted for robbery. A description of this suspect was given to White which included, in addition to the fact that he was a colored male, the approximate age, the approximate size, the wearing apparel and the fact that he was bare-headed. Thus the arresting officer had official information, not only as to the description of the suspect, but also official information as to the crime perpetrated and also an official order directing him to aid other officers in the search for this suspect. Under these facts and circumstances we are of the opinion and so hold that Officer White had probable and reasonable cause to arrest the appellant. . . . 'The sum total of the reams that have been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in light of the circumstances of the moment as viewed through his eyes, for belief that a felony has been committed and that the person before him committed it.'[58]

As these four cases indicate, the existence *vel non* of probable cause calls for a comprehensive trial court inquiry into all of the facts

[58]*Id.* at 777-78, 171 So. 2d at 320.

and circumstances known to the arresting officer at the time of his decision to arrest. If, based on these facts and circumstances, a "prudent man" would believe that a felony had been committed and that the potential arrestee was the guilty party, then the ensuing arrest is lawful.[59]

This brief foray into the tangled thickets of "probable cause" is by no means meant to be an exhaustive one.[60] It does serve the purpose of this article, however, by illuminating a problem area that should not exist, viz., the difficulty often encountered by the prosecution in "proving" the existence of probable cause for an arrest without a warrant. An attack on the validity of such an arrest compels the state to prove both the underlying facts and circumstances *and* that such were known to the arresting officer. As the Court emphasized in *Beck*:[61]

> It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for the petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case *what the informer actually said, and why the officer thought the information was credible.*[62]

Assuming that the underlying facts and circumstances known to the arresting officer did, in fact, constitute reasonable grounds for the arrest, the officer, in his testimony, must inform the trial court of the facts upon which he acted. It is essential that the record be completed with this testimony in order that the trial court and appellate courts may fulfill the judicial function of determining "whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed. . . ."[63]

The problems discussed thus far are relatively simple ones in the sense that guidelines to their solution are readily found in numerous relevant decisions of the Supreme Court and other appellate courts. No such catalog of case law is available, however, for the solution of the problem next considered.

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[59]Other Mississippi decisions which are helpful in defining "probable cause" are Fuqua v. State, 246 Miss. 191, 145 So. 2d 152 (1962); Clanton v. State, 242 Miss. 734, 137 So. 2d 180 (1962); Shay v. State, 229 Miss. 186, 90 So. 2d 209 (1956).

[60]For an exhaustive examination of "probable cause" see Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant*, 35 Miss. L.J. 252 (1964); Rodgers, *Search and Seizure in Mississippi*, 28 Miss. L.J. 20 (1956).

[61]Beck v. Ohio, 379 U.S. 89 (1964).

[62]*Id.* at 97 (Emphasis added.)

[63]*Id.* at 96.

C. The Power To Stop and Question Without "Probable Cause"

1. *The Problem*

At approximately 1:40 a.m. on a September morning, a patrol car containing two police officers turns into a shopping center complex to make a routine check of the store buildings. As the police car proceeds across the parking area at a slow speed, the officers observe two men walking along the deserted concourse in front of the stores. The police car turns toward the men; as it approaches them from behind, they begin walking rapidly. The car speeds up, cuts in front of the men, and stops. The officers leap out and detain one of the men. Although an officer pumps his sawed-off shotgun and shouts "halt," the other man runs around a corner and disappears into a vacant field overgrown with underbrush. In a moment a car drives out of a gravel road in the vicinity of the vacant field at a speed of about ten or fifteen miles an hour. Of necessity, the car must pass near the police officers in order to get out of the shopping center parking area and can easily be intercepted and stopped.[64]

Query: 1. Do the officers have "probable cause" to stop and *arrest*: (a) the two walking men; (b) the driver of the car?

2. Do the officers have the right to stop and *question*: (a) the two walking men; (b) the driver of the car?

The first question may be readily resolved by an application of the general principles concerning "probable cause" previously discussed. Considering first the power to arrest the two walking men, we see that the factors tending to create "probable cause" are: (1) their presence on the deserted shopping center sidewalk; (2) the time (1:40 a.m.); and (3) their walking more rapidly when the patrol car approached. This is the sum total of the "facts and circumstances" known to the officers at the time the decision was made to overtake and stop the men. We now apply to these facts the generalized rule that an arrest may be made if a prudent man would believe that (a) a felony has been committed and (b) these two men are the guilty parties. Regardless of the

[64]These facts are taken from Lacaze v. State, 183 So. 2d 176 (Miss. 1966). The police *did* decide that they had "probable cause" to stop and arrest the two men and the driver of the car and actually arrested one of the pedestrians (Goff) and the automobile driver (Lacaze). The grounds for these arrests, as testified to by one of the officers, were that "at approximately 1:35 or 1:40 in the morning a man didn't have any business being in there where he was." Lacaze v. State, 183 So. 2d 176, 179 (Miss. 1966). After these arrests, the officers searched Lacaze's car and in the trunk found a number of tools, including an acetylene torch. Lacaze was later indicted, tried and convicted for possession of burglar's tools. The conviction was reversed by the Mississippi Supreme Court on the ground that there was no "probable cause" to arrest Lacaze without a warrant.

method by which this equation is worked, the answer must be the same: no "probable cause" to arrest exists. There is absolutely no reason to believe that a felony has been committed; the officers have received no "official information" of such commission, they have received no citizen complaints, and they have observed no broken locks or shattered windows in the shopping center. Nor is there any reason to believe that these men have committed a felony—there are at least a few justifiable explanations for being on foot in a shopping center at 1:40 in the morning![65] And the fact that one of the two men ran away when the patrol car stopped does not legitimatize an otherwise unlawful arrest. The Mississippi court has held: "An arrest begins when an officer begins his pursuit for the purpose of making an arrest."[66] The fact that the proposed arrestee runs away does not legalize the original pursuit nor does it authorize a subsequent arrest for resisting the original attempt.[67]

Turning to a consideration of the power to arrest the man driving the car, we find the "facts and circumstances" to be simply (1) that he was driving a car along a gravel road and across a shopping center parking lot; (2) at ten to fifteen miles an hour; and (3) at 1:40 a.m.[68] Applying the general principles defining "probable cause" to these facts, the Mississippi Supreme Court said in *Lacaze*:

> Realizing that this appellant (Lacaze) has a criminal record and that his testimony lacks the ring of sincerity, nevertheless we cannot find from the proof in this case that the officers had probable cause to believe that a burglary had been committed or was about to be commited when they stopped the appellant as he slowly drove his car down Dale's Lane, removed him from his car, and subsequently arrested him.[69]

Having disposed of the easy problem, we now consider the difficult one: the right to stop and question the two pedestrians and the driver of the automobile. The problem is difficult not because it is unique or novel—indeed the police practice of stopping and questioning individuals is a common one—but because it "has been largely ignored by commentators and dealt with ambiguously by most courts . . . ."[70]

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[65]One such explanation was offered by Goff when the officers asked him why he was in the shopping center. "I was looking for where a girl lived," he replied.

[66]Smith v. State, 240 Miss. 738, 743-44, 128 So. 2d 857, 859 (1961).

[67]*Ibid.*

[68]There is no evidence that the driver of the car was one of the two men seen walking along the sidewalk. Lacaze v. State, 183 So. 2d 176, 178 (Miss. 1966).

[69]*Id.* at 180.

[70]Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 386, 390 (1960).

This dearth of authority renders it difficult to formulate a satisfactory answer to the problem. The fourth amendment proscribes the "unreasonable seizure" of a person, and numerous decisions[71] have held an *arrest* without "probable cause" to be violative of that proscription. But clearly, the brief detention and questioning of an individual does not amount to an arrest. The classic definition of the term "arrest" is that it "consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge. . . ."[72] The policeman who stops and questions an individual usually has no intent to take that person into custody "to answer a criminal charge." The question then is not whether such detention and questioning constitutes an "arrest," but whether it amounts to an "unreasonable seizure" of the person. The resolution of this question is a judicial function, but the task of the courts is rendered difficult by guidelines that are wavering and indistinct.

In an effort to clarify these guidelines and to grant greater flexibility to the police in a motorized age, certain detentions, such as the stopping of a vehicle for the purpose of examining the driver's license of the operator, are specifically privileged by statue.[73] In *Morgan v. Town of Heidelberg*,[74] the Mississippi Supreme Court differentiated such a detention from an arrest by saying:

> In summary, the mere act of stopping cars and detaining drivers momentarily to ascertain whether they are duly licensed does not constitute an arrest. This may be done by properly constituted officers, under the authority of Code section 8108. Such a detention is not unlawful where it is done in good faith for that specific purpose.[75]

Similarly, the stopping of a vehicle and the questioning of its driver for a moving traffic violation is another detention which, though not statutorily privileged, has been accorded judicial validity.[76] But beyond these limited areas of privilege, there remain the numerous instances of police detention and questioning of individuals, in the absence of grounds for arrest, that form a routine part of day-to-day law enforcement. The explanation for such police actions is simple: society demands protection from criminal attack and the easiest way to prevent criminal attack is to intercept the criminal *before* he kills, steals, or assaults.

The typical citizen would feel that the police were remiss

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[71]See, *e.g.*, Henry v. United States, 361 U.S. 98 (1959).

[72]People v. Mirbelle, 276 Ill. App. 533, 540-41 (1934).

[73]See, *e.g.*, MISS. CODE ANN. § 8108 (1956).

[74]246 Miss. 481, 150 So. 2d 512 (1963).

[75]*Id.* at 488, 150 So. 2d at 515.

[76]See Busby v. United States, 296 F.2d 328 (9th Cir. 1961).

in their duty should they fail on their own initiative, or refuse on legal grounds, to investigate by questioning a person who was lurking in the neighborhood for no apparent reason. The disturbed citizen would expect the police to discover whether the suspect was armed and, if so, to disarm him and prosecute him should it be discovered that he was carrying the weapon illegally. Should the suspect refuse to explain what he was doing in the neighborhood, and the policeman apologized for questioning him and then went about his duties leaving the suspect to continue his lurking, the citizen would consider that he was not receiving adequate protection. . . .

The police, under control as in our form of government, are inclined to provide the protection their citizen-employers demand; otherwise the police fail to prevent crime and are subject to sharp criticism for their failure to protect the public.[77]

2. *Proposals to Resolve this Problem*

In order to achieve a balance between the practical necessities of law enforcement and the fourth amendment rights of the individual, a number of formulations have been suggested. The first of these was the Uniform Arrest Act,[78] proposed in 1942. Section 2 of the Act deals with the problem of stopping and questioning:

Section 2. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

Section 3. Searching for Weapons. Persons Who Have Not Been Arrested.

A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return

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[77]Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395, 398 (1960).

[78]Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

it or arrest the person. The arrest may be for the illegal possession of the weapon.[79]

The uniform act seeks to remove the "arrest stigma" from the detention by clearly providing that the "detention is not an arrest" and by further providing that no record of the detention is to be made. The act is unsatisfactory, however, in at least three respects. First, the authority to stop is limited to those persons who are "abroad" and obviously does not cover persons in private dwellings. It is arguable whether it covers persons in such semi-public places as theaters and apartment house lobbies. This limitation precludes an officer who is lawfully on private premises from detaining and questioning persons who may have valuable information relating to some crime. A second deficiency in the act is that it applies only to a person who the officer reasonably believes is involved in the commission of a crime, and does not include those who may be material witnesses to such crime. Unless such witnesses are detained for questioning, they too often tend to "evaporate." The third provision of the act which is unsatisfactory is that authorizing a two hour detention of a suspect. Much constitutional water has gone over the dam since 1942, and it is suggested that the present Supreme Court would hold a two hour detention to be an "unreasonable seizure." In any event, the Uniform Arrest Act has not generated much legislative enthusiasm and only three states, New Hampshire,[80] Rhode Island,[81] and Delaware,[82] have adopted it.

A second and more publicized formulation is the New York "Stop and Frisk" law[83] which became effective on July 1, 1964. This statute is essentially a restatement of section 2 (1) and section 3[84] of the Uniform Arrest Act. In omitting section 2 (3) of the act, the "Stop and Frisk" law eliminates the protective aspects of the two-hour-maximum detention and the specification that no record is to be made

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[79]*Id.* at 344.

[80]N.H. REV. STAT. ANN. § 594:2 (1955).

[81]R.I. GEN. LAWS ANN. § 12-7-1 (1956).

[82]DEL. CODE ANN. tit. 11, § 1902 (1953).

[83]N.Y. CODE CRIM. PROC. § 180-a.

[84]The text of the "Stop and Frisk" law: "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions. 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person." N.Y. CODE CRIM. PROC. § 180-a.

thereof. On the other hand, it limits the detention power of a police officer to those persons abroad "in a public place,"[85] thus eliminating any possibility of an exercise of the power on private premises.

A third and infinitely more ambitious formulation is the Model Code of Pre-Arraignment Procedure developed by the American Law Institute.[86] A prodigious and scholarly undertaking, the code will be offered by the Institute for legislative adoption in the several states. Its purpose is best stated in the Reporters' Introductory Memorandum covering the submission of the code to the members of the Institute.

> It is a goal of this Code to secure a higher level of compliance with legal rules among law enforcement officers. We have proceeded on the premise that laying down clear rules will in itself encourage the police to become increasingly concerned with protection of the rights of individuals under their control. This concern should be further strengthened by placing on the police themselves some of the responsibility for developing regulations and procedures to supplement legislative rules. The police must necessarily operate with a considerable degree of discretion; and the Reporters believe that an integral part of the task of legislation is to design provisions which will not only serve to deter and detect violations, but will also have the effect of encouraging officers to work toward higher standards themselves.
>
> With respect to the substance of the rules here proposed, we think it is clear that any formulation worthy of consideration must at many points strike a compromise between the demands of law enforcement and the need to protect persons who may become involved in the investigation of crime. However, it makes a great difference whether such a compromise is struck arbitrarily or in a form which finds the maximum common ground compatible with conflicting needs and principles.[87]

In their effort to strike a compromise "which finds the maximum common ground" between the interests of society and the individual, the Reporters have proposed, in article 2 of the code, a limited power

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[85] *Ibid.*

[86] A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966) (hereinafter cited as DRAFT). Selected portions of the code are printed in Appendix I. The development of the code began in 1963 under a grant from the Ford Foundation. In 1964, the project was reorganized with Professors James Vorenberg and Paul Bator of the Harvard Law School as Reporters and with an Advisory Committee composed of forty distinguished American jurists, lawyers, and scholars. Preliminary Drafts Nos. 1 and 2 were submitted by the Reporters to the Advisory Committee in June and November of 1965, and each was subjected to extensive revision. Tentative Draft No. 1, published March 1, 1966, will be submitted to the members of The American Law Institute at its annual meeting on May 17, 1966.

[87] DRAFT at xix-xxi.

to stop and detain. As will be seen by reference to the text printed in the appendix to this article, section 2.01 (1) of the code authorizes an officer to "request" any person to furnish information or to cooperate in the investigation or prevention of crime. The proviso to this subsection prohibits an officer from indicating to the person that there is any legal obligation to answer questions directed to him by the officer. Actually, this subsection grants no new authority to the police. It has always been the law that an officer may ask questions of individuals, provided there is no compusion—implied or direct—to answer.[88] This subsection, for the first time in the United States,[89] simply gives express legislative sanction to a routine police practice and provides an adequate safeguard against coercion. Additionally, by specifically authorizing police officers to make inquiries, it rejects the notion that a damaging answer to such inquiries can never be "voluntary."[90]

Section 2.01 (2) deals with the situation in which an officer is not merely making an inquiry, but is actively interrogating a person whom he suspects may have committed a crime. In this situation, the officer must preliminarily make clear to the suspect that no legal obligation exists to respond to the question. If the questioning is conducted at a police station, the suspect must first be informed that he may at that time communicate with his lawyer, family, or friends and that they may have access to him. This subsection goes beyond any requirements in existing law,[91] and undoubtedly it will inspire police protests of impracticability. But in actuality, there is valid precedent for such a requirement in the procedure under article 31 of the Uniform Code of Military Justice[92] which requires that a military officer, before interrogating a suspect, must first inform him of the nature of the accusation, advise him that he does not have to make any statement concerning that accusation, and inform him that any statement made by him may be used against him in a trial.[93] In fact, the requirement of this subsection is less stringent than that of the Uniform Code of Military Justice in that it applies only to "sustained" questioning. It seems reasonable, therefore, that the warning required here can be effectuated by the police without any substantial hampering of the investigative process.

Section 2.01 (3) requires that when an officer requests any person to come to a police station, either as a suspect or as one cooperating in the investigation of crime, he must first make clear to such person that there is no legal obligation to comply with the officer's request.

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[88] *Id.* at 88.
[89] *Ibid.*
[90] *Id.* at 89.
[91] *Id.* at 88, 90-91.
[92] 10 U.S.C. § 831(b) (1952).
[93] *Ibid.*

Section 2.02 contains perhaps the most controversial proposals in the code. Subsection (1) authorizes an officer, if he has reasonable cause to believe that a crime has been committed and that any person has material knowledge thereof, to "order" such person to remain in the officer's presence for a period not to exceed twenty minutes. Subsection (2) provides that if a person is observed in circumstances which suggest that he has committed or is about to commit a crime, an officer may "order" that person also to remain in the officer's presence for no more than twenty minutes. These provisions make two important advances beyond those of the Uniform Arrest Act and the "Stop and Frisk" law in that (a) an officer is authorized to detain a *witness* to a crime as well as a person who is a suspect, and (b) an officer may exercise this power on private premises as well as in "a public place." The value of the extension of the detention power to witnesses is seen in the typical emergency situation where a crime has occurred in the presence of a number of people. By allowing the officer to detain all persons present who he reasonably believes have material knowledge of the crime, he is able to evaluate the situation and to obtain the names and addresses of possible witnesses.[94] The authorization to exercise the detention power on private premises is valuable in that it allows an officer who is "lawfully present" on such premises, *e.g.*, at the invitation of the owner, to take necessary steps to quell a disturbance or to investigate a crime. The authorization itself, however, confers no greater right to enter private premises than the police presently possess.

During the twenty minute period of detention, the officer is authorized by subsection (3) of section 2.02 to: (a) obtain the identification of the detainee; (b) verify such identification; (c) request cooperation under the provisions of section 2.01; and (d) verify the person's explanation of his presence or conduct in such place. In many instances, the information provided the officer will satisfy him of the detainee's innocence and such person will be promptly released. In many other instances, however, the twenty minute period will allow the officer to discover evidence of a crime in the vicinity which will constitute "probable cause" for the arrest of the detainee, or will allow him to obtain from headquarters official information that such detainee is wanted for a particular crime. This detention period serves the very desirable purpose, then, of affording the innocent an opportunity to clear themselves without the inconvenience and stigma of being arrested or carried to the police station. Conversely, it serves the equally desirable purpose of allowing the officer an opportunity to determine whether he should arrest a possibly dangerous offender who might otherwise disappear.

[94]As any policeman or practicing lawyer well knows, the tracking down of witnesses to a shooting is often a difficult task.

In order that the officer might effectively exercise the detention power, subsection (4) authorizes him to use such nondeadly force as may be necessary to stop a person or vehicle and to detain the person in the officer's presence for the twenty minute period. Although force would probably be resorted to infrequently, its reasonable use should be authorized in order to avoid the undesirable effect resulting from an inability of the officer to enforce his order.

It would be foolish to require an officer to detain and question a person on a darkened street without first assuring himself that such person was not fingering the trigger of a revolver concealed on his person. Therefore, out of practical necessity, subsection (5) authorizes an officer who has stopped a person to search such person "and his immediate surroundings" to the extent necessary to discover any weapons which might be used against the officer.

Subsections (6) and (7) are designed to prevent abuses of the detention power and require respectively that (a) unless an officer arrests a detainee, he must release him at the end of the twenty minute period and (b) an officer who has detained a person must promptly prepare and file with his superiors a complete report of such detention. Finally, subsection (8) of section 2.02 constitutes a legislative limitation on the exercise of the detention power in order to minimize the possibility that a policeman may use such power to justify harassment or abuse.

3. *The Constitutionality of Such Proposals*

"The Constitution prohibits unreasonable searches and seizures, and reliance upon 'any standard less than probable cause is unreasonable in the constitutional sense.' "[95]

This argument of the dissent in *People v. Rivera*,[96] which upheld a stop-and-search on grounds less than "probable cause," expresses concisely the arguments against the granting of a police power to stop and detain citizens on such grounds. But in fact there has never been a decision of the United States Supreme Court supporting such strict construction of the fourth amendment. Surprisingly enough, only one case, *Rios v. United States*,[97] has squarely raised the issue before the Court.[98] Rather than decide that issue, however, the Court remanded

[95]People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 38 (1964) (dissenting opinion).

[96]*Ibid.*

[97]364 U.S. 253 (1960).

[98]In *Rios*, police officers had approached a cab stopped at a traffic light and had questioned the occupants. An arrest followed when one of the occupants dropped a package of clearly recognizable narcotics and attempted to flee. The police admitted that they had no "probable cause" to arrest Rios before the package was dropped.

the case to the district court for additional findings. The Court was presented another opportunity to rule on the question when a petition for a writ of certiorari to the New York Court of Appeals was filed in the *Rivera* case. The Court once again evaded the issue by denying certiorari.[99] *Rivera* is an important case because it clearly rejected the notion that the police power to stop on grounds less than "probable cause" is an "unreasonable" seizure of the person. The facts in *Rivera* are strikingly similar to those in *Lacaze v. State,* the Mississippi case from which our problem set of facts is taken. In *Rivera,* three detectives, parked in an unmarked patrol car at about 1:30 a.m., observed two men walking back and forth on the sidewalk in front of a bar and grill. When the men saw the detectives, they turned and began walking rapidly away. The detectives promptly stopped and frisked them, finding a loaded pistol on Rivera, and thereupon arrested Rivera for carrying the concealed weapon. In discussing the right of the police to make the stop, the court said:

> The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into the suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off.
>
> And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . .[100]

In considering the reasonableness of the frisk that produced the pistol, the court said:

> If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty.[101]

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[99]379 U.S. 978 (1965).

[100]People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 34 (1964).

[101]*Id.* 201 N.E.2d at 35.

Other jurisdictions which have judicially recognized the power to detain include Alaska,[102] California,[103] Illinois,[104] Iowa,[105] Washington,[106] and West Virginia.[107] The California rule, precisely stated in *People v. Nickelson*,[108] is perhaps the strongest such judicial formulation:

> In this state . . . we have consistently held that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the officer may arrest the suspect and conduct a reasonable incidental search. . . .[109]

Additionally, decisions in two of those states which have adopted the Uniform Arrest Act have upheld the constitutionality of the detention power.[110] It appears, therefore, that there is substantial authority justifying the legislative enactment of a statute granting to the police a limited detention power. Constitutionally speaking, the Supreme Court has never passed upon the question.[111] However, it would seem reasonable to suggest that the constitutionality of a statute granting a limited seizure and search would depend upon an evaluation of its purpose. Recognizing that the basic purpose of such legislation is to strike a balance between the interests of public order and those of the individual—and to do so by methods that are not inherently unreasonable—it is suggested that such legislation would be found constitutional by the Court.

4. *The Need for a Detention Power in Mississippi*

We have yet to dispose of the second question raised by the factual problem of the *Lacaze* case: do the Mississippi officers have the right to stop and *question* either the two walking men or Lacaze, the driver of the car? Considering that there is no statutory authority for such police action and that the Mississippi decisions are insufficient to establish clearly a common law power to detain and question, the reluctant answer is: probably not.

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[102]Goss v. State, 390 P.2d 220 (Alaska 1964).

[103]People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956).

[104]People v. Faginkrantz, 21 Ill. 2d 75, 171 N.E.2d 5 (1960).

[105]State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964).

[106]State v. Zupan, 155 Wash. 80, 283 Pac. 671 (1929).

[107]State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932).

[108]30 Cal. Rptr. 18, 380 P.2d 658 (1963).

[109]*Id.* 380 P.2d at 660.

[110]See De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960); Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961).

[111]DRAFT at 103-04.

The need for such authority, however, is clear. As *Lacaze* graphically illustrates, there are innumerable situations in which the actions of a citizen, as observed by a policeman, may be entirely innocent or may be the preparation for or the escape from a crime. The interests of society demand that the policeman not stand idly by until such time as the person disappears or actually perpetrates the crime. In *Lacaze*, although there was clearly no "probable cause" for the arrest of either the pedestrians or Lacaze, their presence in the deserted shopping center at 1:40 a.m. was certainly a circumstance which an alert officer ought to investigate. If a statute such as section 2 of the Model Code of Pre-Arraignment Procedure had been in effect, the police officers would have been privileged to stop and detain Lacaze for at most twenty minutes. This would have been ample time to allow the officers to obtain and verify his identity and to verify his account of his presence and conduct. Had he been armed, the limited search of his person authorized by the code would have revealed the weapon and he would have been subject to arrest for carrying a concealed firearm. Or, if the check of the buildings in the shopping center had revealed evidence of a burglary, "probable cause" would undoubtedly have existed for an arrest on a burglary charge. Assuming, however, that no weapon was found, that no evidence of burglary was apparent, and that, on checking with headquarters, the officers received no "official information" that Lacaze was a wanted man, he would have been released at the end of the twenty minute period and would have escaped the expense, inconvenience, and embarrassment of an arrest, indictment, trial, conviction, and appeal.[112] Additionally, the taxpayers would have been spared the considerable expense of the processing through the courts of Lacaze's case. A further effect of such legislation is its tendency to improve relations between the police and the public.

> Legalizing the questioning so that it does not constitute an arrest is to the advantage of both the police and the public. When an officer stops a person and questions him, he is often in doubt whether these acts constitute an arrest. If they do, the officer is subjecting himself to the possibility of a suit for false arrest if he lets the suspect go instead of charging him with some misdemeanor and having the magistrate discharge him. And every time an innocent person is arrested, charged with a crime, and brought before a magistrate, he is humiliated, greatly inconvenienced, and probably put to considerable expense.[113]

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[112]The limited search authorized by the MODEL CODE would not extend to a search of the trunk of a detainee's car. DRAFT at 103. Thus, the "tools" found in the trunk of Lacaze's car in the search following his arrest would not have come to light.

[113]Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

The arguments in favor of legislative adoption in Mississippi of a statute similar to section 2 of the Model Code of Pre-Arraignment Procedure are persuasive. Enactment of such a statute is necessary if we are to achieve a balancing of interests between the security of society and the fourth amendment rights of citizens.

Appendix I

Model Code of Pre-Arraignment Procedure

Article 2. Investigation of Crime.

Section 2.01. Voluntary Cooperation with Law Enforcement Officers.

(1) Authority to Request Cooperation. A law enforcement officer may request any person to furnish information or otherwise to cooperate in the investigation or prevention of crime. The officer may request that such person respond to question, appear at a police station, or comply with any other reasonable request. Compliance with a request for information or other cooperation hereunder shall not be deemed involuntary or coerced solely on the ground

(a) that such request was made by one known to be a law enforcement officer; or
(b) that such request was made to a person ordered to remain in the officer's presence under section 2.02;

provided, that the officer shall not indicate to any person that such person is legally obliged to furnish information or otherwise cooperate hereunder if no such legal obligation exists.

(2) Questioning of Suspects: Required Warning. If a law enforcement officer, acting pursuant to this section, suspects or has reasonable cause to suspect that a person may have committed a crime, he shall, prior to engaging in sustained questioning of such person, take such steps as are reasonable under the circumstances to make clear to such person that no legal obligation exists to respond to such questioning. If any such questioning takes place at a police station, prosecutor's office, or other similar place, such person shall first be informed that he may promptly communicate with counsel, relatives, or friends, and that counsel, relatives or friends may have access to him as provided in section 5.07.

(3) Warning to Persons Asked to Appear at a Police Station. If a law enforcement officer acting pursuant to this section requests any person to come to or remain at a police station, prosecutor's office or other similar place, he shall take such steps as are reasonable under the circumstances to make clear to such person that there is no legal obligation to comply with such request.

Section 2.02. Stopping of Persons.

(1) Stopping of Persons Having Knowledge of Crime. A law enforcement officer lawfully present in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

(2) Stopping of Persons in Suspicious Circumstances. A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for

a period of not more than twenty minutes.

(3) Action to be Taken During Period of Stop. A law enforcement officer may require a person to remain in his presence pursuant to subsection (1) or (2) of this section only insofar as such action is reasonably necessary to

(a) obtain the identification of such person;
(b) verify by readily available information an identification of such person;
(c) request cooperation pursuant to and subject to the limitations of section 2.01; or
(d) verify by readily available information any account of his presence or conduct or other information given by such person.

(4) Use of Force. In order to exercise the authority conferred in subsections (1) and (2) of this section, a law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.

(5) Search for Dangerous Weapons. A law enforcement officer who has stopped or ordered any person to remain in his presence pursuant to this section may, if he reasonably believes that his safety so requires, search such person and his immediate surroundings, but only to the extent necessary to discover any dangerous weapons which may on that occasion be used against the officer.

(6) Action to be Taken After Period of Stop. Unless an officer acting hereunder arrests a person during the time he is authorized by subsections (1) and (2) of this section to require such person to remain in his presence, he shall, at the end of such time, inform such person that he is free to go.

(7) Records Relating to Persons Stopped. A law enforcement officer, who has ordered any person to remain in his presence pursuant to this section, shall with reasonable promptness thereafter prepare and sign a report setting forth the name and address of such person; the place, time and purpose of the stop; the names of additional officers and other persons present; whether the person objected thereto; whether force was used and, if so, the degree and circumstances thereof; and whether the person stopped was searched and, if so, a description of all items seized and their disposition.

(8) Limitations to Prevent Abuse. The authority to stop persons granted in subsections (1) and (2) of this section may not be used solely to aid in the investigation or prevention of the following crimes:

(a) any misdemeanor the maximum penalty for which does not include a sentence of imprisonment of more than thirty days;
(b) loitering;
(c) vagrancy;
(d) . . . (Note: There should be added to this list those felonies and misdemeanors, in connection with which the stop authority is unnecessary, or creates an undue risk of abuse or harassment, such as ordinances requiring permits for public parades or gatherings.)

MECHANICS' LIENS: MISSISSIPPI NOTICE REQUIREMENTS†

*James M. Brown**

One question repeatedly asked by those who are interested in the field of mechanics' and materialmen's liens in Mississippi is: "What is required and advisable today in the way of notices related to construction liens?"

The answer to the question is basically a simple one, and it is summarized at the end of this article. However, in order to understand the reasons behind the answer suggested, and thereby to have confidence in it, one should also consider section 755 (Notice of Suit Affecting Real Estate Recorded) of chapter 3 (Lis Pendens) of the Mississippi Code. The easiest way to understand the effects of the 1962 changes to the Mississippi liens statutes is first to analyze the situation as it was prior to 1962, and then to consider the impact of the 1962 act.[1]

Section 755 dates from 1892.[2] It has, since 1930,[3] been worded as it is today. In essense it *requires* that *any person* who is *beginning suit* to enforce (1) a lien upon, or (2) a right to, or (3) an interest in any real estate *must* (with specified exceptions)[4] file for record in the county containing the real estate involved, *a notice* describing (1) the nature of the complaint, (2) the names of the interested parties, and (3) a description of the property. The clerk of the chancery court, upon receipt of such notice, is directed to file it in the lis pendens record. This particular notice is to be filed *only* by persons who are *beginning suit*. Its obvious purpose is to provide record notice to parties who might deal subsequently with the property.

From 1892 to 1928 this was the only construction-related provision for record notice signalling possible legal activity affecting real estate.[5] In 1928 the predecessor to today's section 380 was passed.[6] This new

†This article supplements the author's mechanics' lien article which appeared at 37 Miss. L.J. 208 (1966).

*Associate Professor of Law, The George Washington University.

[1]Miss. Laws 1962, ch. 488.

[2]Miss. Ann. Code ch. 85, § 2783 (1892).

[3]Miss. Code § 2325 (1930).

[4]The exceptions are those situations where a claim is founded upon an instrument which is recorded [which logically would include the contract recordation provided for in Miss. Code Ann. § 356 (Supp. 1964)], and where a claim is founded upon a judgment duly enrolled [which would logically include a judgment provided for in Miss. Code Ann. § 372 (1956)].

[5]See, *e.g.*, Alliance Trust Co. v. Nettleton Hardware Co., 74 Miss. 584, 21 So. 396 (1896).

[6]Miss. Laws 1928, ch. 136. This section included "architects," who were in the same year (1928) brought within the coverage of the basic lien section, today's § 356.

section was written *to extend the privilege* (but not the duty) of a lis pendens notice to "any laborer, materialman or architect" who was *"entitled, or who may become entitled"* to a lien under chapter 5[7] (such persons being identified by section 356 as limited by section 357). It *also* gave this privilege to any laborer, materialman or architect who was or who might become entitled to give a *stop-notice*[8] to the owner.

To acquire this privilege of recording a lis pendens notice even though they had not commenced suit, the designated parties were required to notify the owner in person (or in writing if a non-resident) by giving him a copy of the notice to be recorded. Furthermore, they had to certify to the chancery clerk, as a prerequisite to his entering the notice in the lis pendens book, that they had so notified the owner. Once such requirements were met, the recording of the information called for in section 755 in the lis pendens book became statutory "notice both of the lien[9] and to the owner and all other persons interested, all of whom shall be bound thereby."[10]

A lis pendens notice under section 380, however, did not "freeze" undisbursed contract funds still in the owner's hands, as did the stop-notice provided by section 372.[11] It merely put the owner or any person considering subsequent acquisition of an interest in the described property on notice about the possibility of or the existence of a priority claim. It permitted the laborer, materialman, or architect to acquire and protect, for a limited time, a priority of interest in the property against subsequent encumbrancers or purchasers, even though he did not commence suit.[12] The lis pendens notice under section 380 was less likely to incur the enmity of the prime contractor against the noticing party

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[7]Miss. Code Ann. § 380 (1956). (Emphasis added.)

[8]The reference is to the stop-notice authorized by Miss. Code Ann. § 372 (1956).

[9]By implication it must also be notice of the right to or interest in the described real estate.

[10]Miss. Code Ann. § 380 (1956) also provided that the owner's total liability under such liens be limited to the amount of the original contract, and, within that limit, to the "amount of the owner's liability thereunder at the time the notice is filed. . . ." It further provided for a prorata settlement in the event that the liens exceeded the original contract amount. This provision is very similar to the limitation of liability provision which had long been a part of § 372, the stop-notice section. See, *e.g.*, Deposit Guar. Bank & Trust Co. v. J. F. Weaver Lumber Co., 215 Miss. 183, 60 So. 2d 598 (1952).

[11]Miss. Code Ann. § 372 (1956).

[12]The time limit for commencing suit was twelve months from the last furnishing of labor or materials, and any forthcoming judgment against the owner became a lien against the property dating from the time of the service of the stop-notice. See, *e.g.*, Inerarity v. A. S. Wade & Co., 141 Miss. 552, 106 So. 828 (1926).

or to put that contractor's financial status in jeopardy, than was the section 372 stop-notice. However, since it imposed a "cloud" on the title to the property, such a notice was disturbing to the owner.

In comparison, the section 372 stop-notice was personal to the owner, and was not per se a record notice.[13] Its net effect was to prevent the owner, after he had received the notice,[14] from making further disbursements under the contract until the subcontractor[15] claims were paid in full or pro-rata out of remaining contract funds. Serving this notice often had the effect of abruptly halting construction pending accumulation, analysis, and negotiation of all potential claims arising therefrom.[16] As a remedy designed to make available to the subcontractor the maximum fund statutorily possible, it was very effective. But the

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[13]Until the stop-notice is actually served on him, the owner can properly continue to disburse contract funds at his discretion, even though he has deliberately avoided service. See, *e.g.*, City Coal & Lumber Co. v. Gulf Refining Co., 184 Miss. 260, 185 So. 250 (1938).

[14]See McNair v. M. L. Virden Lumber Co., 193 Miss. 232, 246-48, 4 So. 2d 684, 687-88 (1941), wherein the court traced the history leading to its finding (1) that one notice to the owner of a claim against the contractor stops the right of the owner to pay the contractor, and (2) "if other claimants in the same class subsequently give notice to the owner of their claims, or if they do not give the notice, but assert their claims in court, to which the owner is a party, all before the owner has paid out the funds which he had when the first notice was received, then all such persons share ratably in those funds." An interesting aspect of this case is the court's reference in 193 Miss. at 246, 4 So. 2d at 687 to the fact that a decision in Citizens' Lumber Co. v. Netterville, 137 Miss. 310, 102 So. 178 (1924), was not binding because that decision, though made after the 1918 statutory amendment which supported the *McNair* decision, was made with reference to the former statute, which the court and counsel for both sides inadvertently thought to be still controlling.

[15]It was held that a subcontractor of a subcontractor could not give an effective stop-notice in Gammill Co. v. Guesnard, 167 Miss. 868, 150 So. 214 (1933), but the changes made in 1962 which give a direct lien to contractors, without distinction as to their relative status, does not exclude sub-subcontractors, and this decision would probably be held no longer applicable today. However, it is interesting that the fairly recent case of Redd v. L & A Contracting Co., 246 Miss. 548, 151 So. 2d 205 (1963), held that when a subcontractor fails to pay a sub-subcontractor, then the primary contractor, upon notice of such failure, is not required to hold funds belonging to the subcontractor until the sub-subcontractor is paid.

[16]Fear of such disruptions is one of the major reasons why subcontractors and materialmen often refrain from using this remedy. Too often one of the major effects of serving such a notice is that the contractor customer whose financial stability is put in question thereby, vents his displeasure by transferring his business elsewhere. The vagaries of the construction business cause serious fluctuations in the cash basis of most of its participants, and the inability to pay when payment is due is not uncommon, nor a dependable signal warning of financial crisis. Often a technical delay several steps removed, that holds up a payment check, creates a chain reaction of delayed payments resembling a tumbling row of dominoes.

stop-notice alone merely forced such fund into an escrow-like status. To effect distribution of this fund, the procedure established by section 372 required institution of suit by the contractor against the owner, or by the subcontractor against the contractor, with mandatory and permissive joinder involving all interested parties in the action. Out of such a suit, a judgment favorable to the subcontractor became a judgment lien against the property unless the owner had surrendered the bound amount to the court for distribution in accordance with the judgment reached. This judgment entitled the subcontractor to satisfaction out of the undisbursed contract funds ahead of the prime contractor, and, in cases where the owner could not provide the necessary amount, to enforcement of his lien by foreclosure.

Once a suit under section 372 had commenced, the lis pendens notice required by section 755 had to be recorded.[17] That notice established the date of priority of the claim (if any) of the prime contractor[18] over subsequent purchasers or encumbrancers. If the suit resulted in a judgment against the owner and in favor of the subcontractor,[19] section 372 provided that the judgment became a lien enforceable "as other liens provided" in chapter 5. That lien was made effective, according to the statute, "from the date of the original [stop-] notice. . . ." It would seem on its face that this would permit priority as of that date over subsequent purchasers and encumbrancers whether or not the stop-notice had been recorded on the date of service. However, considering this specification in the context of provisions of sections 380,[20] 356,[21] and 755,[22] one can reasonably expect the courts to demand, as the price of such a priority, a record notice of some type. Consequently, it would seem advisable for those contemplating service of a stop-notice to

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[17]See MISS. CODE ANN. § 755 (1956).

[18]If the prime contractor had availed himself of the alternative of recording his contract, as provided for in § 356, then his priority over subsequent parties dated from that recording.

[19]The words "subcontract" or "subcontractor" as used hereinafter are meant to include laborers, materialmen, architects, and other persons who have been given positions as priority creditors by § 356, and who are not in privity with the owner.

[20]MISS. CODE ANN. § 380 (1956) states that the claim must be recorded in due form in the lis pendens book in order to be record notice under that section. The implication is that it is effective notice to "other persons interested" as of the date of recordation.

[21]MISS. CODE ANN. § 356 (1956) states that the lien therein provided is effective notice to subsequent purchasers or encumbrancers only from the date of commencement of suit or of recording the contract (or, after 1962, after recording notice of the contract).

[22]MISS. CODE ANN. § 755 (1956) provides for record notice of commencement of suit, and the recording provides the effective date of priority of lien over subsequently interested parties.

accompany it or even to precede it with a section 380 lis pendens notice or the equivalent.[23]

The contractor in privity with the owner, and therefore entitled by sections 356 and 371 to a direct lien, could protect his interest against subsequent purchasers or encumbrancers either by commencing suit or by filing the contract itself for record, as specifically provided for in section 356 (and as implied in section 755). It is at least arguable that he would also be included among those privileged to record a lis pendens notice under section 380.[24] If so, this would permit him to anticipate commencement of suit and to gain priority over subsequent interests without exposing the details of his contract to public scrutiny, which he would have to do in order to acquire this early priority under section 356. However, of the various alternatives by which the prime contractor could establish priority over subsequently-acquired interests, the surest and simplest procedure was to place his contract on record. The disadvantage to both owner and contractor in having to expose the terms of the contract was eliminated in 1962.[25]

In summary, the situation prior to 1962 was as follows:

(1) Specified subcontractors could establish priority of claim over

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[23]Unless this procedure is used, it is at least arguable that the holding in the *McNair* decision, *supra* note 14, would not be applicable against claimants of a different class. As to subsequent purchasers, a record notice of the lis pendens variety must, for each potential lienor, antedate the acquisition of the subsequent interest by persons belonging to another class of claimants.

[24]Section 380 limits its application to "any laborer, materialman or architect" who is or may become entitled to a lien, etc. It is conceivable that a consideration of "legislative intent" coupled with a "literal meaning" argument as to the definitions of "laborer, materialman or architect" could be used to support the argument that § 380 did not pertain to the prime contractor in privity with the owner. However, the fact that he does supply labor and materials, albeit such furnishing is largely vicarious, should allow him to come under the coverage of the section. Furthermore, it would be an unproductive exercise to exclude him there, since he can achieve the same results by recording his contract or by commencing suit (or, after 1962, by recording notice of his contract). If he commences suit, he is obliged by § 755 to record in the lis pendens book. The privilege of such recordation under §380 would tend to give better warning of pending difficulties to subsequently interested parties than would a mere recordation of the contract, and it would force upon the owner an actual notice in place of constructive notice under the contract recording provisions of § 356, thus working to the owner's advantage. It would permit greater latitide in resolving differences than would exist after suit was commenced under § 356. Finally, since the lien actually becomes effective, according to § 356, on the date of the contract, except as to subsequent purchasers or encumbrancers without notice, it would provide the desired notice necessary to protect such interests.

[25]The amendment to § 356 (Miss. Laws 1962, ch. 488) permitted the alternative of recording notice of the contract, in lieu of placing the contract itself of record.

interests acquired subsequently by recordation of a lis pendens notice provided under section 380;

(2) They could gain priority over the prime contractor for any portion of the contract amount still undisbursed through service of a stop-notice to the owner, as provided by section 372;

(3) For all practical purposes the subcontractor's lienable interest was the undisbursed balance due on the original contract, since sections 372 and 380 both limit the owner's liability to that amount;

(4) The subcontractor was prohibited by case law from serving a stop-notice until some services or materials had been provided,[26] but he could record a lis pendens notice under section 380 as soon as the original contract was in effect and he had been notified to participate;

(5) A judgment lien acquired under the provisions of section 372 established priority for the subcontractor over parties acquiring interests (a) subsequent to the date of the stop-notice,[27] according to a literal interpretation, or (b) subsequent to a lis pendens or other record notice, according to a safe prediction of judicial interpretation;

(6) The prime contractor acquired his lien by virtue of the relationship of the parties.[28] As to subsequent purchasers or encumbrancers without notice, his lien was effective from the date of commencement of suit (at which time he was required by section 755 to record a lis pendens notice) or from the date of recordation of his contract. It is arguable that he might also file a lis pendens notice under section 380, and by doing so establish the date of his priority from the time of that recordation.

Impact of the 1962 Act

In 1962 some highly significant provisions were incorporated into section 356.[29] First was the alternative provided to those who were granted the lien privilege by this section; they might establish priority of claim over subsequent purchasers or encumbrancers by simply recording notice of the contract with the owner. This was in addition to the existing provisions for recording the contract itself or for commencing suit. This made even more desirable the relatively simple process that predisposed the contractor to adhere to the procedures provided by section 356 rather than to follow those stipulated in section 755. However, the predisposition was somewhat tempered by the fact that the

[26]See United States Fid. & Guar. Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929), which held that a letter written by a materialman to an agent for the owner before any materials were furnished was ineffective as a statutory stop-notice.

[27]Section 372 provides: "such judgment shall be a lien, from the date of the original notice. . . ."

[28]See Miss. Code Ann. § 371 (1956).

[29]Miss Laws 1962, ch. 488.

1962 amendments radically diminished the procedural differences between the requirements under the two sections. A new subsection (b) was added to section 356, directing that all notices under the section be entered in a newly-created Notice of Construction Liens book, to be kept by the clerk of the chancery court. Entries therein had to include "a description of the property involved, the name of the lienor or lienors, the date of filing, if and where suit is filed, and if and where contract is filed or recorded."[30] This was a demand for all of the information required by section 755 plus some in addition thereto, and thus the simplicity of the earlier contract recordation was lost. However, it was not necessary under this section first to commence suit, as was required under section 755.

Because this section 356(b) notice provides the same but more comprehensive information than does section 755, and because it specifically provides record notice to subsequent purchasers and encumbrancers at an earlier date than does section 755, it would appear that there is no further need to file a section 755 lis pendens notice upon commencement of suit, where the section 356(b) notice had previously been recorded. The only real argument in favor of still filing the lis pendens notice under such circumstances would seem to be one based on the mandatory nature of its prescription. A contra argument would point out that section 755 was written thirty-two years prior to the provisions instituted by section 356(b) in 1962, and that section 356 was radically amended in 1962 without, however, being accompanied by efforts to update and correlate existing provisions of other sections which were overlapped or on occasion controverted by the 1962 amendments. It would hardly seem reasonable, therefore, to hold that a failure to record a lis pendens notice under section 755 upon commencement of suit negated the lien priority which had already become effective through an earlier recordation of the same information in another official book of record under a newer statutory provision instituted to achieve the same basic goal of protection of subsequent parties. To reach a contrary decision, a court would have to mock the obvious legislative intent: to provide the earliest notice possible to subsequent purchasers or encumbrancers of an existing preferred claim against the property in which they were considering an interest. Of course, if the prime contractor elects not to record either his contract or notice thereof, his lien is not effective against subsequent parties until he commences suit, in which case he must record a lis pendens notice under section 755.[31]

Another significant aspect of the recordation section of today's

[30] MISS. CODE ANN. § 356(b) (Supp. 1964).

[31] It is possible that the courts will interpret literally the § 356(b) clause "such liens, as provided hereunder, shall not take effect unless and until some notation thereof shall be filed and recorded in said [Notice of Construction Liens] book. . ." to deny liens altogether if not so recorded.

356(b) stems from the inclusion, under the new direct lien provision furnished by 356(a), of parties who contribute labor or materials to the property improvement but who are not in privity with the owner. These subcontract entities, having been granted a direct lien privilege, must now meet the prerequisite of filing the contract or notice thereof in the Notice of Construction Liens book, in order to establish the date of their priority over purchasers or encumbrancers acquiring interests subsequent to that date. A question presently unanswered is whether the notice to be recorded by subcontractors relates to the contract between the owner and the prime contractor, or to that between the prime contractor and the subcontractor. The information most helpful to third parties would require data from both contracts, and therefore prudence would dictate that the notice incorporate a reference to both, in order to forestall the possible success of a challenge to the sufficiency of the notice.[32]

Case law has established that once a stop-notice has reached the owner, all claimants of the same class subsequently giving notice or, alternatively, asserting their claims in court, share ratably in the undisbursed contract funds.[33] Such decisions could be interpreted as establishing this class priority only vis-à-vis the prime contractor. If so, the section 356(b) provisions may well be held to be of the race-notice variety, in which case priority over subsequent purchasers or encumbrancers may depend in each instance on the relative dates and times of recordation. Where the owner rather than the prime contractor is the one in default, such an interpretation would provide him with the capacity to initiate action to divest himself of the property upon receipt of a stop-notice that was not supported by a record notice, and thereby to establish the priority of the purchaser as superior to that of prime and subcontractors, even though the stop-notice gave all subcontractors the class preference over the prime contractor.[34]

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[32]Very often the contract between the prime and the subcontractor will be verbal, thus complicating the situation. On too many occasions, the same carelessness will exist in the agreement between the owner and the prime contractor. Craft-guild tradition that built reputation on integrity and skill and made "a man's word his bond" has disintegrated with the collapse of the apprentice system, which was destroyed by World War II demands for manpower; but remnants of old ways hang on and die hard.

[33]See, *e.g.*, McNair v. M. L. Virden Lumber Co., *supra* note 14.

[34]The clause in § 356(b) negating liens provided by § 356(a) unless and until they are recorded in the Notice of Construction Liens book should be a major incentive for placing all liens on record. However, past experience in other states indicates that such will often not be the case. Absent a general industry or trade practice of making this recordation, the prime contractor will often tend to coerce the subcontracting parties to dispense with it, and they will often oblige, as a means of soliciting or retaining business. Only if an entire category of potential lienors (*i.e.*, lumber dealers, plumbers, etc.) make a general and routine practice

Under the new requirements of section 356, subcontractors who would be entitled to file a lis pendens notice allowed by section 380 may gain an equivalent advantage by recording notice of the contract in the Notice of Construction Liens book. By doing so they can avoid the extra effort to perfect actual service of the notice on the owner, which section 380 requires. The net result is that the section 356 requirements are now most closely akin to those of section 755, from which section 380 was originally drawn.

It should be emphasized that section 356 now specifies that *all notices* under *that act shall* be filed and recorded in the Notice of Construction Liens book, and that the *liens provided by the section "shall not take effect unless and until* some notation thereof shall be filed and recorded" in that book.[35] Once so recorded, the liens then take effect, *except* as to subsequent purchasers or encumbrancers, upon the furnishing of any labor or materials and in accordance with section 371. As to subsequent purchasers or encumbrancers, the lien is effective only from the date of the recordation in the Notice of Construction Liens book, or, if no such filing is made, then from the date of the lis pendens notice required upon commencement of suit.[36]

The lienor is permitted a period of twelve months from the date of the last furnishing of labor or materials in which to commence his action to enforce the lien.[37] Failing to act within that time costs him his lien priority and his status reverts to that of an ordinary creditor.

The final question regarding the subcontracting parties is whether the award of a direct lien negates their need to employ the stop-notice provided by section 372. That provision was designed to reserve for allocation among such secondary participants the funds not yet disbursed by the owner to the prime contractor. Prior to 1962, only a judgment which these subcontractors might eventually acquire against the owner, in follow-up action after the stop-notice, could be treated as a lien against the property. This judgment lien was necessary as a basis for further action directed toward a foreclosure sale. In 1962 these subcontractors acquired direct lien rights under the amended section 356,

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of recording the notice of their contract as soon as they have it will the individual members of the class dare to record in the face of displeasure evidence by the prime contractor. The most expedient time to make general changes of policy of this nature is immediately after the passage of a statutory modification that seems to dictate the new policy. But rapid analysis of pending legislation and a capacity for communication and education of the group membership (that seems presently beyond the organizational capacity of most construction industry associations) is necessary in order properly to handle the matters of timing and public relations so that the policy to be implemented can be effectively instituted.

[35]Miss. Code Ann. § 356(b) (Supp. 1964). (Emphasis added.)

[36]See text accompanying note 31 *supra.*

[37]Miss. Code Ann. § 360 (1956).

and could proceed more expeditiously toward foreclosure under that section than they could under section 372, because their lien was no longer contingent upon a judgment but rather was effective upon recordation in the Notice of Construction Liens book. Thus, after 1962, the sole remaining purpose for section 372 is to permit the subcontract lienors to tie up the funds owing to the general contractor by the owner, in order to keep the maximum fund possible available for satisfaction of their claims. Because the owner's liability is limited to the amount of the original contract, such a purpose is as important under the new provisions as it was under the old, the only difference being that the subcontractor can commence suit upon his lien and proceed to final decision with less procedurally-induced delay. The issuance of the stop-notice therefore would seem to be strategically as sound today as it was prior to 1962.

The net effect of the 1962 changes on noticing considerations prompts the following observations:

(1) All lienors should file record notice as specified under section 356 in the Notice of Construction Liens book, in order to make their liens effective against all parties at the earliest possible date;

(2) Such a notice may be filed as soon as a prime contract exists and the lienor can accumulate the required information for the record; (Subcontractors should make reference to both prime and subcontract.)

(3) Such a notice performs the same function as a lis pendens notice, so that recordation under section 356(b) renders a section 380 or a section 755 lis pendens notice largely superfluous;

(4) If such a notice is not filed, then the section 755 lis pendens notice is mandatory when commencement of suit occurs, and priority against subsequent purchasers or encumbrancers dates only from that time;

(5) A stop-notice under section 372 should be served as soon as possible, in order to insure the maximum possible fund from which to achieve satisfaction of the claim. Until he receives the stop-notice, the owner is free to make selective payments and all such payments directly reduce the fund available for distribution to the remaining lienors, since the owner in no case is liable for more than the original amount of the contract;

(6) In all cases, service of the stop-notice should be of a nature permitting an official record of the date of service. Therefore, it would seem that the minimum effort would be a delivery by registered mail, return receipt requested, and that the only dependable method would be service by legal process. Since a stop-notice in any case is disruptive of existing relations, it would seem that the little additional harm done

by using legal process for service would be more than offset by the added security gained;

(7) Section 356 gives the same lien rights to prime and subcontractors, but it does not destroy the subcontract class-priority established by a stop-notice, vis-à-vis the prime contractor. Since any record notice under section 356(b), section 380, or recordation of the stop-notice puts subsequent purchasers or encumbrancers on record notice, any such notice may protect the priority of the subcontractor class by imposing a duty on the subsequent parties to inquire further. However, there is no assurance of this, and therefore as to such parties, a race-notice priority system may prevail;

(8) Action to enforce the lien must still be commenced within twelve months from the last labor or materials furnished under the original contract. Failure to act within that time destroys the lien priority and relegates the lienor to the status of an ordinary creditor.

SYMPOSIUM: SOUTHERN JUSTICE

Foreword

The various activities of recent years to insure the availability of constitutional rights to all persons have provoked wide comment throughout the nation. Although all reasonable men must agree that justice under the law is one of the basic cornerstones of American democracy, justice is an intangible term which can have a different meaning to different people, usually according to the interests they support. However, many persons categorically express the belief that justice is lacking in the South today.

Representative of such expression is the book recently published by Pantheon Books entitled *Southern Justice.* This work consists of a compilation of articles written by nineteen lawyers, law professors, and law students, in which the authors elaborate upon their experiences with Southern justice.

Because of the grave importance of this subject, the *Journal* recognizes its responsibility to this region and the nation to publish this symposium. Each writer was asked to compare recent commentary, such as that which appears in the book *Southern Justice,* with the judicial process his experiences have shown actually to exist in the South today. The following essays are the result of such comparison.

The purpose of this symposium is to present a thorough and authoritative discussion by responsible persons of the general subject "Southern Justice." It is believed that benefits can be derived only from the consideration of many differing viewpoints, which it is the further purpose of this symposium to present.

PASSION AND PREJUDICE

*W. N. Ethridge, Jr.**

Friedrich Nietzsche once said, "Nothing on earth consumes a man more quickly than the passion of resentment." The authors of the seventeen essays in *Southern Justice*[1] are consumed with the passion of resentment to what they consider to be the slowness of the civil rights cause in the South. In general, they passionately resent everything about the South—its history, its mores, its customs, its state governments, and its courts—except perhaps one or two federal district judges and four members of the Fifth Circuit Court of Appeals. Ironically, this extremely emotional involvement in the civil rights cause of the Negro in the South shows that those who are decrying racial prejudice are demonstrating a blind and unreasoning prejudice against the great mass of white people in the Southeastern States. The reader who is looking for an objective and knowledgeable analysis of the administration of justice in the South will not find it in this book.

The foreword by Mark DeW. Howe and the introduction by Leon Friedman set the tone for the entire volume. Howe refers to "a structure of local insolence and national disability" among a people, "many of whom are eager and willing to hold it (the rule of law) in defiant scorn."[2] He alludes to "the turning of public power into an instrument of lawlessness" and "the framework of contrived anarchy . . . throughout the South."[3] Friedman distinguishes between civil disobedience by a civil rights demonstrator and reluctance by Southern officials actively to enforce integration in all areas of life. He thinks there is not "isolated injustice or occasional error, but an entire pattern and practice . . . that effectively overrules the law. . . ."[4] Referring to constitutional rights and law in the South, he says "there is no equality, desert, conscientiousness, dignity, regularity, or decency in its operation."[5]

Jack Oppenheim, in the chapter entitled "The Abdication of the Southern Bar," states, "The white members of the Mississippi Bar have forsaken their professional responsibilities"[6] in the areas of civil rights and criminal charges against Negroes, and that white Mississippi attorneys seem "congenitally unable to recognize when a Negro is being

*Chief Justice, Supreme Court of Mississippi, Jackson, Mississippi.

[1]FRIEDMAN, SOUTHERN JUSTICE (1965).

[2]Howe, *Foreword* to FRIEDMAN, SOUTHERN JUSTICE at vii (1965).

[3]*Ibid.*

[4]Friedman, *Introduction* to FRIEDMAN, SOUTHERN JUSTICE at 7 (1965).

[5]*Id.* at 8.

[6]Oppenheim, *The Abdication of the Southern Bar,* in SOUTHERN JUSTICE 127, 133 (Friedman ed. 1965).

mistreated."[7] A 1964 resolution of the Board of Bar Commissioners of the Mississippi State Bar restated the standards of the great majority of Mississippi lawyers. It reaffirmed that every person should and must be accorded the assistance and protection of competent counsel, and that practicing attorneys of this state "should take . . . representation of a person charged with crime, or seeking legal redress of grievances." Pursuant to this resolution, the President of the State Bar appointed a special committee to act as liaison with the federal and state courts. Contrary to Oppenheim's statement, the resolution was not limited "to those rare instances where the prospective client could pay an adequate fee."[8] Although there may have been instances where individual members of the Mississippi Bar declined representation in unpopular causes, in my opinion these have been the exception and not the rule.

Moreover, the Mississippi State Bar created a liaison committee to confer and work with the Lawyers' Committee for Civil Rights Under Law, which for some time has been operating a law office in Jackson, Mississippi. The Lawyers' Committee is staffed primarily by volunteer lawyers who are not members of the Mississippi Bar and are not qualified to practice law in this state.[9] Yet they practice regularly in state and federal courts, representing litigants in civil rights litigation without objections being raised by Mississippi lawyers. Most states, such as New York, have a strong policy against the practice of law by persons not licensed and admitted to practice by the state.[10] With considerable doubt among many as to the propriety of relaxing standards for admission to the State Bar, Mississippi lawyers have not sought to stop this activity by out-of-state civil rights attorneys who are not authorized to practice here.

Not only has the State Bar assumed its responsibility, but also the Supreme Court of Mississippi has consistently and firmly upheld constitutional rights. A brief survey of some of its recent decisions is relevant at this point.

Shortly after *Gideon v. Wainwright*[11] was decided, the Mississippi Legislature gave full recognition and effect to it by establishing an assigned counsel system for those charged with felonies less than capital.[12] The Supreme Court of Mississippi has also given full effect

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[7]*Id.* at 134.

[8]See *id.* at 128 for Oppenheim's statement.

[9]MISS. CODE ANN. §§ 8660, 8666 (1956); MISS. CODE ANN. § 8649 (Supp. 1964).

[10]See Spanos v. Skouras Theaters Corp., 34 U.S.L. WEEK 2530 (N.Y. March 18, 1966).

[11]372 U.S. 335 (1963).

[12]MISS. LAWS 1964, ch. 357.

through its decisions to *Gideon* and the implementing statutes.[13] The court also promulgated its Rule 37, which applied the *Gideon* doctrine to appellate as well as trial proceedings, and set up procedures for assigning counsel on appeal.[14]

Mississippi has simple methods of post-conviction review, which provide for a full and fair evidentiary hearing, thus permitting the convicted person to make his claims and be heard on them. Where the case has been affirmed by the Mississippi Supreme Court, the petitioner proceeds by an application to the supreme court.[15] Where a conviction has not been affirmed by the Mississippi Supreme Court, and the time for appeal has expired, petitioner has a clear remedy by a simple motion in the trial court to vacate, set aside, or correct the sentence and to order a new trial. At this hearing he may raise all appropriate issues, including constitutional rights.[16]

Haywood Burns is a third-year law student at Yale. His chapter on "The Federal Government and Civil Rights" asserts that "if non-conviction continues in civil rights cases, the government will have to reconsider its approach to trial by jury."[17] He advocates "creative ways to meet this systematic denial of equal justice,"[18] and concludes that in Mississippi the jury system "works as an arm of the state in perpetuating a white supremacy society."[19] One may question the breadth of knowledge and experience of a third-year law student. Assuredly, Burns has no knowledge of decisions of the Mississippi Supreme Court dealing with jury selection.

Harper v. State[20] reversed a conviction of attempted rape and held that token summoning of Negroes for jury service does not comply with the equal protection clause. Dealing with a particularly difficult and delicate problem, the court said:

> We recognize that in some counties compliance with these constitutional requirements may present difficulties, but they must be surmounted if the criminal laws are to be effectively administered. The United States Constitution does not require proportional representation of the races on a jury, or even that

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[13]Clarke v. State, 251 Miss. 627, 170 So. 2d 575 (1965); Conn v. State, 251 Miss. 488, 170 So. 2d 20 (1964).

[14]See *Rules of the Supreme Court of Mississippi*, 36 Miss. L.J. 182, 202 (1965).

[15]Miss. Code Ann. § 1992.5 (1956).

[16]*In re* Broom's Petition, 251 Miss. 25, 168 So. 2d 44 (1964); see Ethridge, *Recent Trends in Criminal Law, and Their Effects Upon Mississippi Practice*, 37 Miss. L.J. 9, 23 (1965).

[17]Burns, *The Federal Government and Civil Rights*, in Southern Justice 228, 249 (Friedman ed. 1965).

[18]*Ibid.*

[19]*Id.* at 250.

[20]251 Miss. 699, 171 So. 2d 129 (1965).

> members of a particular race must be on a particular jury. As a practical matter, what is required is that the county officials must see to it that jurors are in fact and in good faith selected without regard to race.[21]

Complete ignorance of these decisions and rules of court is evident in Michael Meltsner's chapter entitled "Southern Appellate Courts: A Dead End." Meltsner paints in broad strokes, with conclusions unsupported by facts. He thinks that "the courts of southern states are traps,"[22] and that Southern judges are prejudiced against Negroes, and are susceptible to "pressure and prejudice."[23]

Meltsner denigrates "Mississippi justice" in the so-called Freedom Rider cases, citing the leading one, *Thomas v. Mississippi*.[24] These cases involved rather close constitutional issues not theretofore decided by the United States Supreme Court. The defendants were organized for the purpose of traveling across the South, rightly or wrongly, to engage in civil disobedience. On the facts, the Mississippi court thought that the constitutional criteria of *Feiner v. New York*[25] were applicable. Its opinion is a lengthy and careful analysis of the constitutional and factual issues. Yet the United States Supreme Court[26] peremptorily and without an opinion granted certiorari and reversed the judgment, citing two cases pertaining to interstate commerce but not dealing with the precise issues in *Thomas*. Despite such a peremptory and non-definitive method of disposing of *Thomas* and related cases, the Mississippi Supreme Court followed the mandates and discharged the appellants.[27]

The Mississippi court reversed, in *Guyot v. State*,[28] another conviction actually stemming from a civil rights demonstration in Hattiesburg. In still another case, Robert Moses was convicted of disturbing the public peace by leading in McComb a parade of one hundred junior and senior high school pupils, from the Negro schools, on a protest march into the city. His conviction was reversed by the Mississippi Supreme Court.[29] The evidence was insufficient to support the charge, with *Thomas* and *Guyot* being cited and followed.

Except for a passing reference to *Thomas v. Mississippi*, none of the essays in *Southern Justice* refer to or consider any of the above decisions

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[21] *Id.* at 710, 171 So. 2d at 134.

[22] Meltsner, *Southern Appellate Courts: A Dead End*, in SOUTHERN JUSTICE 136, 137 (Friedman ed. 1965).

[23] *Id.* at 139.

[24] 252 Miss. 527, 160 So. 2d 657 (1964).

[25] 340 U.S. 315 (1951).

[26] 380 U.S. 524 (1965).

[27] Bassford v. State, 178 So. 2d 688 (Miss. 1965); Thomas v. State, 176 So. 2d 258 (Miss. 1965).

[28] 252 Miss. 509, 175 So. 2d 184 (1965).

[29] Moses v. State, 179 So. 2d 9 (Miss. 1965).

of the Mississippi Supreme Court. Whether such omission was accidental or deliberate, I do not know, but it is manifest that the authors had already assumed their major and minor premises and conclusions before writing these animadversions.

Shirley Fingerhood, a New York attorney, writes about "The Fifth Circuit Court of Appeals." In a rather patronizing tone, she holds that Judges Tuttle, Rives, Brown, and Wisdom have good records; Judges Jones, Hutcheson, and Bell have "mixed records"; and Judges Cameron and Gewin poor ones, because they oppose some of the decisions by the four judges first mentioned.[30] She concludes: "If . . . indecisive or prejudiced judges come to outnumber The Four, the entire complexion of the civil rights movement may change."[31] By her definition, a judge is "indecisive or prejudiced" if he is willing to consider each case objectively, and is not an activist in the civil rights movement.[32]

The pompous, provincial attitudes of the several essayists are illustrated by Jeremiah S. Gutman's chapter, "Oktibbeha County, Mississippi." He takes an isolated instance of a trial before a rural justice of the peace and generalizes: "Sometimes in these brushes with Mississippi justice, a lawyer gets the feeling that, just perhaps, he is making the local community think and reappraise their actions and attitudes."[33] Marvin Braiterman, in "Harold and the Highwaymen," narrating another experience before a justice of the peace, concedes, "In my fantasy, I began to consider contacting Governor Rockefeller, asking him to retaliate against any Mississippi drivers found in the State of New York . . . and jail them for using a New York highway without first obtaining a New York driving license."[34]

Jesse Brenner, a New York attorney, in a short essay about another justice of the peace case, reaches these remarkably broad conclusions about the entire state from that limited experience:

> In Mississippi, a man honorable and moral in all other respects automatically divorces himself from honor and morality in dealing with Negroes who are seeking their basic freedoms or with those who champion their cause. A man who would rarely lie under normal circumstances believes lying to be a virtue when civil rights are involved; regular churchgoers do not feel impious when they participate in Negro church burnings

[30]Fingerhood, *The Fifth Circuit Court of Appeals,* in SOUTHERN JUSTICE 214, 216 (Friedman ed. 1965).

[31]*Id.* at 227.

[32]See *id.* at 214-27.

[33]Gutman, *Oktibbeha County, Mississippi,* in SOUTHERN JUSTICE 80, 87 (Friedman ed. 1965).

[34]Braiterman, *Harold and the Highwaymen,* in SOUTHERN JUSTICE 88, 96 (Friedman ed. 1965).

> or bombings; and officials who otherwise take their oaths of office seriously do not feel they are violating their duty by actively participating in or tacitly sanctioning illegal acts.[35]

I could go on ad infinitum referring to instances of highly personalized, unobjective, and blanket indictments of Southern courts in this rather poorly written book. The foregoing instances are self-explanatory and indicate the nature of the se diatribes. The only article with any pretense of objectivity and precision is a reprint of an article by Louis Lusky from the Columbia Law Review entitled "Racial Discrimination and the Federal Law: A Problem in Nullification."[36]

It is true that the South, as well as the North, is going through a painful reevaluation of its established patterns and standards.[37] But, assuredly, this book contributes nothing toward resolution of issues related to the administration of justice in the South. It creates heat, but no light, passion and prejudice, but no intellectual integrity and reasonableness.

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[35]Brenner, *The Case of the Disappearing Docket*, in SOUTHERN JUSTICE 103, 105 (Friedman ed. 1965).

[36]63 COLUM. L. REV. 1163 (1963).

[37]See Honnold, *The Bourgeois Bar and the Mississippi Movement*, 52 A.B.A.J. 228 (1966).

SOUTHERN JUSTICE

*Joe T. Patterson**

Southern Justice was written by nineteen lawyers who spent from two weeks to three months in the states of Georgia, Florida, Alabama, Mississippi, and Louisiana working with what they are pleased to call the civil rights movement. Most have never lived in the South. Most have never actually engaged in the practice of law in the South. They know nothing of the true history of the trials and tribulations of the people of the South. Nevertheless, they have written a book wherein they piously proclaim themselves to be absolute authorities on the subject with which they deal. They have diagnosed the ills and prescribed the cure for the maladministration of justice in each of the states with which they dealt.

I began the practice of law in my native state of Mississippi in 1929, and have been Attorney General of the state since 1956. It has been my privilege to participate in the trial of lawsuits from the justice of the peace courts in rural Mississippi to the Supreme Court of the United States. I feel that I am in a better position to pass judgment upon the administration of justice in Mississippi than the gentlemen who wrote *Southern Justice.*

It would require the writing of another book of equal length to answer completely all of the charges and conclusions set forth in this book. I have no intention or desire to do so. I shall not attempt to comment on the parts of the book dealing with Alabama and Louisiana, except to say that they are obviously just as biased and slanted as those sections dealing with Mississippi.

I, like any other general practitioner in this state, would never contend that there have not been in the past, and will not be in the future, miscarriages of justice in Mississippi. I doubt that even the authors of *Southern Justice* would deny that the same can be said concerning their states.

In this book the entire personnel of the judicial systems of five states, from the rural justices of the peace to the supreme courts, are condemned and ridiculed. Southern appellate courts are characterized as "a dead end." One has only to review the decisions of the supreme courts of the Southern states, especially the Supreme Court of Mississippi, to see that this charge is simply not true.

In 1949 Justice Julian Alexander eloquently stated the position of the Mississippi Supreme Court when he said:

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*Attorney General of Mississippi, Jackson, Mississippi.

> It would unjustly discredit this Court to assume that it lacked an awareness of the constitutional prohibitions against discrimination in such cases as an infringement of the due process and equal protection clauses. Long prior to the emergence of causes celébrés which have been headlined as heralds of a rediscovery of civil rights, this Court boldly condemned a purposeful discrimination against Negroes in the matter of jury service. Farrow v. State, 91 Miss. 509, 45 So. 619. See also Hampton v. State, 88 Miss. 257, 40 So. 545, 117 Am. St. Rep. 740. Eighty years ago this state pioneered in the use of Negroes on grand and petit juries. Lee v. State, 45 Miss. 114. . . .[1]

The 1965 case of *Harper v. State*[2] is a recent example of where the Mississippi Supreme Court reversed the conviction of a Negro on grounds that members of that race had been systematically excluded from the grand and petit juries.

This book has much to say about the federal district courts and the Fifth Circuit Court of Appeals. Only four members of the nine-member court of appeals and one of the district court judges were the recipients of commendation from the authors of *Southern Justice*. The authors conclude that it is next to impossible to find lawyers in the Fifth Circuit possessed of sufficient ability, integrity, and courage to be suitable federal judges, and suggest that the President go elsewhere to find suitable judges for these states.

In view of the criticism, condemnation, and ridicule directed at the state and federal judiciary of the states comprising the Fifth Circuit, it is interesting to note that the many cases cited in *Southern Justice* were decided in favor of the cause which the authors advocate. Nevertheless, the authors criticize the lower courts for rendering adverse decisions and the federal courts for being too slow.

A chapter in the book is devoted to Judge William Harold Cox, United States District Judge, Southern District of Mississippi. This chapter casts Judge Cox in a false light. An unbiased look at the overall record of Judge Cox will show him to be an able and conscientious judge. He has been the victim of a deliberate effort to discredit him by a small group of lawyers simply because he does not subscribe to their philosophy of government and law.

The Southern lawyers join the Southern judges in the eyes of the authors of this book. One chapter is entitled "The Abdication of the Southern Bar." This charge is simply not true. I know that many attorneys in Mississippi stand ready to represent those who are in fact indigent and cannot afford counsel. The Southern Bar has refused, and I think rightfully so, to become free counsel for a band of pro-

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[1]Patton v. State, 207 Miss. 120, 40 So. 2d 592 (1949).

[2]251 Miss. 699, 171 So. 2d 129 (1965).

fessional self-styled protestors, crusaders, and demonstrators. Moreover, in order for a lawyer satisfactorily to represent this group, he must be ready to take the position that whatever they might have done, and regardless of how flagrant they may have been in ignoring the laws of a state or municipality, they were only exercising their constitutional rights peacefully to assemble and to protest oppression and deprivation of their constitutional rights.

The entire content of *Southern Justice* is one of rank inconsistency. The authors condemn what they are pleased to call "police states," and then call for a federal police force with sufficient strength in each of the states condemned to take charge of any situation and rectify any alleged wrong on the spot. If any such arbitrary, strong-armed, on-the-spot procedure is adopted by the federal government to handle civil rights disputes, it will be the entering wedge for a similar procedure in all other types of controversy and litigation. The result might well be a direct dictatorship and the downfall of the American system of jurisprudence.

The authors claim to be champions of constitutional government, yet they advocate depriving people in the South of rights guaranteed to them by the sixth amendment of the Constitution of the United States. The sixth amendment guarantees to every citizen accused of crime "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." In the face of this guarantee the authors of *Southern Justice* suggest that southerners accused of crime be taken beyond the jurisdiction of their states and tried. It is indeed difficult to understand how lawyers who profess to be champions of constitutional government can make such suggestions.

The true picture of Mississippi is that of a state whose government and people are committed to the rule of law. The Civil Rights Act of 1964 has been accepted as the law of the land since being upheld by the United States Supreme Court, even though it is by no means approved by the people of Mississippi. Only a short time ago the requirement of the payment of a poll tax as a prerequisite to voting was held to be unconstitutional by the Supreme Court and by a three-judge court in Mississippi. I have instructed, through the press and otherwise, every circuit clerk and county board of election commissioners to comply with this ruling and to place on the poll books all names that have been removed for nonpayment of the poll tax, and in the future not to remove any names or fail to add any name for failure to pay the poll tax. Within a short time, a three-judge federal court will render a decision in the case of *United States v. Mississippi,* which will determine whether persons who are unable to read and write must be registered by county registrars.

Whatever the decision may be, I will immediately order county registrars to comply therewith.

Segregation is no longer enforced in public facilities which come under the provisions of the Civil Rights Act of 1964. Since 1962 no Negro applying for admission to an institution of higher learning of the State of Mississippi has been denied admission if he was found to be eligible. In short, the people of Mississippi are obeying the law of the land.

In conclusion, *Southern Justice* is a book written by people who see everything in the South through a jaundiced eye. Since they obviously made no effort to see both sides of the question, the picture their book presents of Southern justice is badly distorted. They base sweeping generalizations upon a single incident, and take no notice of obvious facts which belie their conclusions. The inconsistencies between what they claim they stand for and what their proposals indicate they stand for are appalling.

Much resentment exists between the people of the North and the South. I believe that much of this resentment is the product of misunderstanding. *Southern Justice* deepens this misunderstanding. Such writing may sell books, but it does a great deal of harm to human relations.

JUSTICE AND PROTECTION

*Alexander M. Bickel**

The problem of law enforcement in the South, or in a current and not inaccurate phrase, "Jim Crow justice," has come to be symbolized by a number of well-publicized killings in recent years. Medgar Evers, head of the NAACP in Jackson, Mississippi, was shot from ambush in the spring of 1963. Lemuel A. Penn, a Washington, D.C., Negro, was killed while driving through Madison County, Georgia, in July 1964. That same summer saw the brutal murder of three civil rights workers, Michael Schwerner and Andrew Goodman, both white Northerners, and James Earl Chaney, a local Negro, in Philadelphia, Mississippi. In the spring of 1965, Mrs. Viola G. Liuzzo of Detroit was shot to death in Lowndes County, Alabama, on the highway between Selma and Montgomery. Some months later in Hayneville, the seat of Lowndes County, Jonathan M. Daniels was killed, and his companion, a Catholic priest, badly wounded, by a shotgun blast fired in the street, in daylight, before witnesses.

There have been no state-court convictions in any of these cases, nor even a state prosecution in the Schwerner-Goodman-Chaney case. One Byron de la Beckwith was twice tried for the Evers killing in a Mississippi court, and twice there was a hung jury. The shooting of Mrs. Liuzzo was seen by an F.B.I. informer riding in the murder car. A first trial in Hayneville of Collie LeRoy Wilkins, whom the F.B.I. informer identified as the killer, resulted in another hung jury. A second trial ended in acquittal. Thomas L. Coleman, also tried in Hayneville, admitted that he shot Daniels. His defense was that Daniels and his companion were armed and threatening him. He was acquitted. Men accused in the Penn killing were acquitted in Danielsville, Georgia, in September 1964.

It is necessary to resist the temptation to feel certain that each of these cases was a miscarriage of justice. Individual guilt is simply not to be determined—not in any circumstances, even for purposes of public action or private judgment—on the basis of newspaper reports of trial proceedings, or of police or prosecution charges. But quite aside from the question of individual guilt, which is properly left open, one may be troubled by the frequency of these acquittals and hung juries and by their similarity. A coincidence of innocents cannot be all there is to it. Moreover, the South has produced a remarkable number of unsolved cases, all of a particular kind. The murders men-

*Kent Professor of Law and Legal History, Yale Law School.

tioned above are merely the tip of the iceberg. In a report on equal protection in the South released on November 14, 1965, the United States Commission on Civil Rights records the estimate that between January 1955 and January 1959 there were 225 incidents of racially motivated violence in the South, including 6 killings, 73 shootings, beatings, and stabbings, and 74 bombings and burnings of homes, schools, and churches.[1] "The number of incidents," the Commission continues, "increased greatly in 1961 as a result of organized civil rights activity."[2] In Mississippi alone in the summer of 1964—the summer of the Philadelphia murders—there were some 6 murders, 35 shootings, 65 bombings and burnings, and 80 beatings. And no arrests or prosecutions, let alone convictions, to speak of.[3] These statistics are translated into people, places and events—quite literally into flesh and blood—in the transcript of hearings held by the Commission in Jackson, Mississippi, in February of this year. The transcript makes bad reading and demonstrates beyond question that the criminal writ has not run in parts of the South against certain kinds of violence.[4]

If convictions were obtainable in cases of this sort, which is to say, if the criminal law of the state were normally enforced, there would, no doubt, be some deterrent effect. No one can say how much. No one has any real quantitative idea of the deterrent force of the criminal law. But there would, we may assume, be some. And the criminal law would at any rate play its symbolic and supportive role as vindicator of the moral order. But the criminal law is, at best, a blunt and primitive instrument for controlling behavior. It works best when it bespeaks and confirms the virtually unanimous moral indigation of the community—which, sadly but plainly enough, it cannot be said to do in civil rights cases in such a place as Lowndes County, Alabama. Even in ideal circumstances, however, the criminal law does not get at the roots of vicious acts and is incapable of absolutely preventing their recurrence. This much is as true in Lowndes County as on the streets of northern cities. Therefore, no matter what effective measure might be taken to visit criminal punishment on the perpetrators of racial killings and assaults who now so often go free, a substantial problem of affording protection against racially motivated violence would remain to be dealt with by additional, more direct means.

"Jim Crow justice" has two other, quite separate aspects as well. One, emphasized and illuminated in *Southern Justice,* is the administra-

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[1] UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 12-13 (1965).

[2] *Id.* at 13.

[3] *Ibid.*

[4] See UNITED STATES COMMISSION ON CIVIL RIGHTS, ADMINISTRATION OF JUSTICE (1965) (hearings held in Jackson, Mississippi).

tion of the criminal law against Negroes and their white allies, which in the Deep South is generally discriminatory and often brutally unjust in individual cases. Here we come around full circle. The question is not how to activate a criminal process that will in some measure tend to protect the victims of racial outrages, but how to protect people from racial outrages committed by a perverted criminal process. Finally there is the other side of this coin, which may be observed also in northern cities: the evil practice, on the part of police and other law enforcement officers, of acquiescing in, and indeed encouraging, the demoralization of the Negro community by failing to apply to it the moral standards embodied in the general criminal code. A different and laxer law often governs with respect to assaults and even homicides in the Negro ghetto (always provided the victim is not white), and certainly with respect to other, less grave offenses.

> The "negro law" of Mississippi is a law of many parts. . . . From the letter of our statutes, a stranger might justifiably infer they applied to all persons within this state. . . . The judges, lawyers, and jurors all know that some of our laws are intended to be enforced against everybody, while others are to be enforced against the white people, and others are to be enforced only against the negroes; and they are enforced accordingly. . . . There are some things . . . that a negro may do with impunity . . . while a white man . . . would get ten years. . . .[5]

This passage—perhaps there is some tacit rue in it, but no apparent embarrassment—is taken from an article published in a legal magazine of high standing and national circulation by a Mississippi lawyer named S. F. Davis in 1913. A great deal of evidence can be adduced to show that in Mississippi and elsewhere things remain much the same.

The search for solutions naturally begins with the Southern jury, which is what it is because it is almost invariably all-white. The Supreme Court has, of course, held unrelentingly since 1880 that the fourteenth amendment forbids racial discrimination in the selection of juries.[6] In pursuance of this principle, however, the Court has done no more than occasionally reverse criminal convictions upon proof that there was discrimination in the selection of the jury that rendered the verdict. A different sort of attack on the all-white jury proved successful in a recent case with the wonderful allegorical title of *Gardenia White v. Bruce Crook*[7] (Gardenia White being a Negro plaintiff

[5]See Davis, *The Negro Law of Mississippi*, 20 CASE AND COMMENT 329 (1913).

[6]Eubanks v. Louisiana, 356 U.S. 584 (1958); Avery v. Georgia, 345 U.S. 559 (1953); *Ex parte* Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880); Gordon v. Breazeale, 246 F. Supp. 2 (N.D. Miss. 1965); Smith v. Breazeale, 245 F. Supp. 978 (N.D. Miss. 1965).

[7]Civil Action No. 2263-N, D. Ala., Feb. 7, 1966.

and Bruce Crook a member of the Jury Commission of Lowndes County, Alabama). The decree in this case ordered abandonment of the existing jury roll and enjoined discrimination in making up a new one. Thus it circumvents the tedious method of enforcement through reversals in individual criminal cases, which have often left the system virtually unaffected, since the occasional reversal of a conviction is a price that many Southern counties have been willing to pay for continued discrimination.

But it would be altogether too sanguine to look for spectacular results from this line of attack, worthwhile as it is to pursue it. If there is local resistance, abetted in some measure by unsympathetic Southern federal district judges—and it would be foolish to expect otherwise—injunctions will no more solve the jury problem than they solved the voting problem. Unless there is unexpected surge of voluntary compliance, a solution will ultimately have to follow the analogy of the Voting Rights Act of 1965. Congress will have to establish some federal criteria for jury selection, suspending the local ones, and perhaps send down federal officials—the counterparts of the federal examiners now registering voters in the South—to supersede county jury commissioners for the time being. These would be radical measures, as are their equivalents, embodied in the Voting Rights Act of 1965. But Congress has the power to go to these lengths in enforcing the fourteenth amendment, since with respect to the composition of juries as with respect to the right to vote, discrimination has not yielded to more moderate approaches and persists on a massive scale. As in the voting legislation, local control would merely be suspended, not permanently displaced.

It will take, however, very large numbers of Negro names on jury lists to ensure that some Negroes survive challenges and other customary privileges extended in the process of forming the trial jury, and actually wind up in the box.[8] And it will take a willingness on the part of Negroes to serve and not ask to be excused. Negroes on juries can then, perhaps, conduce to fairer trials for Negro and other civil rights defendants. In all cases they will have some beneficial effect on the atmosphere in the jury room—they are likely, as Mr. Charles Morgan, Jr. points out,[9] at least to clear it of racial jokes. Yet they cannot secure convictions, which require a unanimous vote.

To the extent that the problem is failure to prosecute, and that acquittals, when there is a trial, are caused by the frequent lack of zeal, if not worse, of investigative and prosecuting officials—to that extent, federal trials might take up the slack. But the relevant federal

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[8]See Swain v. Alabama, 380 U.S. 202 (1965).

[9]Morgan, *Segregated Justice* in SOUTHERN JUSTICE 155, 164 (Friedman ed. 1965).

criminal statutes are nearly a hundred years old; they were poorly drafted to begin with, and they are in a state of grave disrepair.[10] The Supreme Court has just rehabilitated them in some measure in the cases involving the federal prosecutions for the Schwerner-Goodman-Chaney[11] and Lemuel Penn[12] murders. The solution, however, such as it can be, of the difficulties with these statutes, lies not in revised judicial interpretations, but in revised statutes.

In the exercise of its power under the fourteenth amendment, Congress can define more specific offenses committed "under color of law," and thus avoid some of the need for proof of subjective intent.[13] And it can declare that certain classes of crimes committed in circumstances that indicate racial motivation (*e.g.*, crimes against civil rights workers, or against Negroes who have tried to exercise their constitutional rights) are not being punished locally, and that this constitutes a denial of equal protection by the state. Congress can then undertake to make such crimes punishable under federal law, whether perpetrated by private or official persons, with or without official knowledge and connivance. The Civil Rights Commission has recommended enactment of a statute of this sort.[14] Congress would be walking extremely close to the limit of federal power here, but a skillfully drafted statute might carve out a valid new area of federal authority, even if a relatively narrower one than the problem really calls for. But such a statute would in any event bring on no millennium.

Federal criminal cases must also be tried by Southern juries—*federal* Southern juries, but Southern nevertheless. Even assuming that Negroes sit on federal juries, they cannot secure convictions, anymore than on state juries. For this reason, and owing also to the general limitations of the criminal law as a method of preventing anti-social acts, a task of protection against violence will remain to be faced by the federal government.

There is no such thing as absolute security, but in the Deep South as much as on the subways of New York, substantial protection against a rash of violence will be afforded not by new laws or by criminal convictions, but by law enforcement officers on the scene. The President's power to put men on the scene is remarkably extensive and independent. It is not, of course, boundless, or in some circumstances free from legal doubts. But there is, the Supreme Court once said, "a

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[10]See, *e.g.*, 18 U.S.C. §§ 241, 242 (1952); United States v. Williams, 341 U.S. 70 (1951).

[11]United States v. Price, 34 U.S.L. Week 4313 (U.S. March 28, 1966).

[12]United States v. Guest, 34 U.S.L. Week 4323 (U.S. March 28, 1966).

[13]*Cf.* Screws v. United States, 325 U.S. 91 (1945).

[14]United States Commission On Civil Rights, Law Enforcement 177-78 (1965).

peace of the United States,"[15] which is inherently in the President's keeping. There is also considerable statutory authority, particularly in a section that derives from an 1871 law known as the Ku Klux Act.[16] This section may be no better a job of draftsmanship than other Reconstruction measures, but its interpretation is at least initially the independent function of the President himself, and he is under no obligation to take a restrictive view of it.

It would be irresponsible to suggest a pervasive police or military occupation of even a portion of the South. Hence difficult decisions are obviously called for in choosing places to which to send federal marshals and, in a pitched crisis, military police. But a vigilant F.B.I. can presumably provide some intelligent guesses about the places where violence threatens, and as to some areas no more need be known than that civil rights workers are there. Questions will also arise concerning the extent of police authority that federal marshals should be instructed to exercise, once they have been dispatched. But even if they are instructed not to make arrests without warrants and to use force only to repel attacks, their conspicuous armed presence as bodyguards, so to speak, for American citizens exercising in the South their federal rights to move and speak freely is bound to nip a great deal of violence in the bud. Their presence in the right place on the right occasion may perhaps also shame local leaders into reassuming their own responsibility for law and order. The Civil Rights Commission has recommended that the President use federal marshals in this fashion, and also that they be authorized to make arrests when federal crimes are committed in their presence.[17]

Of course these suggestions carry some risks, signally the possibility of ugly incidents between marshals and local officers, and of the injudicious use of force by the marshals against private individuals. No one should wish to give occasion for cries of police brutality or repeat the not very successful experience of Reconstruction. But incidents and excesses can be guarded against, and the suggestion is not that an extensive police force be sent to the South to displace, or clash with, the local force. The number of places where the need for protection is acute, and the times when it is, are after all quite limited, and the suggestion is merely that a few well-marked, armed federals should be in evidence. Had they been present, for example, in the mob milling around that wretched store in Hayneville where Coleman killed Jonathan Daniels, there might possibly have been no killing.

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[15] *In re* Neagle, 135 U.S. 1, 69 (1890).

[16] 10 U.S.C. § 333 (1952).

[17] UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 180-81 (1965).

Protection against harassment of Negroes and civil rights workers by the perverted use of local criminal laws is as inescapably a judicial function as physical protection on the streets is ultimately an executive one. Judicial protection is assured in the end by appeal from local convictions to the Supreme Court, or by habeas corpus petitions in lower federal courts. But these methods often come too late and do not avoid the burdens and expenses of litigation. A more effective method is the removal of state prosecutions at their inception to a federal court, or the issuance of a federal injunction against them. Federal courts have naturally been reluctant thus to interfere with the state criminal process, and the applicable federal statutory law has hardly invited them to do so.[18] The safe course for a federal district court has been to allow state prosecutions to run their course, and until recently decisions to this effect by federal district judges were not reviewable. Congress in the Civil Rights Act of 1964, however, made such decisions reviewable by courts of appeal,[19] and the Court of Appeals for the Fifth Circuit has shown increased willingness to look into charges of harassment and of groundless prosecution.[20] Congress could by statute encourage the federal courts to do so, although care would have to be taken not to insert the federal judiciary, as a normal procedure, into the initial stages of the state criminal process. The object, after all, is not to take it over, but to induce the state criminal process to purge itself of abuses.

There is thus only one aspect of "Jim Crow justice" which could not be usefully addressed by federal legislative, judicial, and executive action, and that is the demoralizing administration by law enforcement officers in Negro communities of a different and laxer criminal and moral code than is enforced in the white community. Here the solution lies in the change of attitudes toward the Negro, which we must hope will follow from the exercise of the franchise and from the general drive to desegregate all state and many private activities. This ultimate development will, of course, also render obsolete all other intermediate expedients aimed at abolishing "Jim Crow justice."

Until then, the federal government has it in its power only to control the disease, not to cure it. For generally valid constitutional reasons, it cannot assume the basic criminal jurisdiction, nor administer criminal justice without recourse to local juries. If it could, the result would not be instant racial peace, because the criminal law is incapable of eradicating crime. The realization that this is so ought to moderate

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[18]See, *e.g.*, 28 U.S.C. §§ 1441-47 (1952); New York v. Galamison, 342 F.2d 255 (2d Cir. 1965).

[19]28 U.S.C. § 1447(d) (Supp. 1965).

[20]Rachel v. Georgia, 342 F.2d 336 (5th Cir.), *cert. granted*, 34 U.S.L. WEEK 3014 (U.S. Oct. 11, 1965).

one's impatience—in the South as much as on Northern streets—with the restraints the Constitution imposes on the so-called war against crime. But the things the federal government can do will cleanse Southern justice of some of its present corruption and will save some lives. These things are therefore very much worth doing, and worth doing with the utmost zeal.

SOUTHERN JUSTICE

*William Waller**

On January 27, 1950, after graduation from the Ole Miss Law School, I was admitted to the practice of law in the State of Mississippi. Offices were opened with $400.00 of borrowed capital, and to date, with the exception of two years Army service, I have been engaged in the active practice of law continuously and exclusively. There were no family connections, and there were only such friends as I was able to acquire after moving to Jackson, on which to build any law practice. All of this is by way of explanation of the fact that such business and prominence which I have been able to acquire has been built on the representation of the man in the street. Inasmuch as the group of "men in the street" in Jackson, Mississippi, is composed of about 60% white men and 40% Negro men, most of my early business, and a large percentage of my practice today, is in the representation of Negroes. For this reason I feel myself atypical of lawyers in Southern towns and cities, and therefore somewhat qualified to speak on Southern justice. My practice runs the gamut of the justice of the peace courts to the state supreme court and the federal district courts in this state. In August of 1959 I was elected to serve as District Attorney for the counties of Hinds, Madison, and Yazoo, in which capacity I have served since January 1960. My staff consists of myself and one other attorney, and consequently I am engaged personally and daily with the disposition of matters criminal and civil involving rich and poor, male and female, black and white. These cases include at least 1000 felony matters a year. For this additional reason, I feel perhaps even more qualified to speak on Southern justice in these counties, a jurisdiction with which I am familiar.

As to civil matters, I know of no case in which any defendant, Negro or white, was ever deprived of any right or cause of action by deliberate act of jury or court. As in any section of our country, there certainly have been times in Mississippi where a local defendant or plaintiff was given more benefit of doubt by a jury composed of his neighbors. Perhaps these instances resulted in what the opposing party may have thought to have been injustice. However, they were certainly not the result of a breakdown in the judicial system nor the integrity of any of the courts. It has been my experience that the poor, the illiterate, and the weak, for whatever reason they suffer, have been viewed with sympathy more often than not, with a resulting grant of mercy in the findings by both court and jury. Jury verdicts as to damages to which persons so

* District Attorney, Seventh District, Jackson, Mississippi

described may have been entitled have never been, in my practice or experience, diminished on account of race, color, religion, or previous condition of servitude. Because there are those who are illiterate, there *are* instances to my knowledge in which a civil defendant has in a commercial transaction lost what he should not have lost. Usually these losses are the result of apathy on the part of the civil defendant. More often than not this person had not consulted a lawyer until his position was so irretrievably damaged or lost that no amount of legal assistance would aid him. Education may help to reduce the occurrence of this type loss in the future, but this is doubtful. It must be assumed also, that this situation exists in other sections of the country.

To turn to matters criminal, experience again dictates that the poor, the weak, and the illiterate most often get more mercy than justice in the imposition of sentence. This categorical statement may be true only in this immediate jurisdiction, but other jurisdictions in Mississippi within my knowledge and practice also seem to mete more mercy than justice to such unfortunate defendants. In the first place, crimes against property in Mississippi, *i.e.*, theft, burglary, false pretense, etc., all carry maximum sentences which appear very temperate. Burglary conviction can result in the imposition of a sentence of seven years in the state penitentiary. This maximum sentence has been rarely imposed in this jurisdiction, and then only when the defendant has such a record of similar convictions that one is inescapably led to the conclusion that the defendant is a habitual burglar. In this tri-county jurisdiction the first offender, or youthful defendant, is rarely sentenced to imprisonment in the penitentiary. On his first conviction a fine or imprisonment on the county farm is the rule rather than the exception. Quite often this sentence is suspended, in whole or in part. A fine or county farm sentence can only be imposed in misdemeanor cases. Therefore, if the matter was a felony case, there must occur a reduction of the charge. This reduction, I believe, also is merciful, inasmuch as one who has been convicted of a felony cannot be placed on probation thereafter. A felony conviction affects a man's opportunity to get a job, join the Army, vote, and participate in other like areas of responsible citizenship. All of this is taken into consideration when a charge is reduced, in the hope that the offender will not continue on the criminal path. I believe that in using this practice we have been very fortunate in helping many first and youthful defendants out of a deepening rut and away from crime.

Crimes of violence carry sentences which range from a fine to the imposition of the death penalty, depending upon the gravity of the matter. Assault and battery with intent to kill has a maximum ten-year sentence authorized, with a minimum of a fine of not more than $1000.00. Murder, rape, and armed robbery carry the death penalty. As a matter

of practice the death penalty is rarely sought and even more rarely imposed. During my tenure in office only one white man and one Negro man in this area have been sentenced to death. The Negro man's sentence was later commuted to life imprisonment. It is my experience that juries here give every reasonable doubt to the defendant and that the claim of the defendant of drunkenness as an excuse will more often than not be resolved in his favor.

A great deal has been said about disparity of sentences in bi-racial crimes. Surprisingly, to some readers I am sure, there is comparatively little bi-racial crime in this area. To be sure there have been some cases in past months which have attracted nationwide, if not world wide, attention. I would say, however, that as one actively engaged in such matters of criminal nature daily, I know that one absent from the scene can only base his judgment upon surmise and supposition and is not privy to a full disclosure of fact nor investigation.

In matters criminal, defendants have much more opportunity for speedy trial and freedom of movement here, than I understand them to have in other sections of the country. It is a rare thing for a criminal defendant here to be required to post bond in excess of $5,000.00. The general rule is a bond of $1,000.00 per charge, unless the defendant be a known and habitual criminal, a transient, or defendant in a capital case. There are probably more defendants released here on recognizance than any remaining section of the United States. The right to bond is a vital right, and one which in my experience is here weighed cautiously and considerately.

As to speedy trial, no court in this jurisdiction has criminal matters on the docket more than six months old, unless they are kept there by the act of the defendant. A charge made will be presented to the grand jury within six months of occurrence in Madison, Yazoo, and the Second District of Hinds County, because the grand jury convenes only that often. This practice is true of practically all other counties in the state. In the First District of Hinds County, however, the grand jury is convened approximately every ninety days, and trial is generally held in the term in which the indictment is returned.

Although this has been a fairly rambling discourse on the mechanics of court function in this immediate jurisdiction, I have given it in an effort to elaborate upon four factors which cause me to believe Southern justice in this jurisdiction is as much mercy as justice. These factors are: (1) reasonable bail; (2) speedy trial; (3) temperate sentence; and (4) mercy and compassion toward the weak, poor, and illiterate. This last factor is my own opinion, but my opinion is based upon observation and experience.

I am sure that there are isolated cases to which persons can point specifically and say, "This does not meet your definition of Southern

justice." With them I will not argue. The comments I have presented are made as I look at the broad spectrum of sixteen years daily activity and not at the individual facet of a particular case. I do not comment upon the instances arising outside of this immediate jurisdiction for the reasons above stated. It is my further considerated opinion that the true mettle of our Southern justice is indicated by the overall calm and deliberate manner in which the rapid disintegration of the mores and customs of the Deep South area has been largely accepted. And, although skirting repetition, it is further my belief that the isolated instance of furor, violence, and disclaim about which this area has been so testily condemned reflects only a very minute portion of Southern society. On the whole, the individual, rich or poor, literate or illiterate, black or white, reaps only that which he has sown and deserves.

CLARKSDALE CUSTOMS

*Semmes Luckett**

Among the collection of scurrilous articles which were published under the collective title of *Southern Justice* is one called "Clarksdale Customs,"[1] which creates the impression that the Clarksdale Bar is a group of lawyers who have defaulted—through prejudice or fear of hostile public opinion—in their duty "never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed." It requires an answer from the Clarksdale Bar, if only for our self-respect and because of our regard for the good opinion of our fellow lawyers.

The best answer, or so it would seem, should be our record. I am therefore persuaded to recall some of the outstanding cases in which lawyers presently practicing their profession in Clarksdale were put to the sort of test our detractors seem to consider an infallible yardstick to one's devotion to the cause of freedom and justice. In our opinion—having lived through the ordeals they presented—they make a record of which the Clarksdale Bar can be justly proud.

I will begin with an event in December of 1925, when a Negro by the name of Lindsay Coleman achieved the dubious distinction of being the last Negro to be lynched in Coahoma County. He was generally believed to have been one of several Negroes who had brutally murdered and robbed a white man by the name of Grover C. Nicholas. The intensity of the feeling against him should be gauged by the fact that his life was taken in revenge by some who undoubtedly were convinced of his guilt. His cause was, to say the least, a most unpopular one.

The story of Lindsay Coleman is pertinent because he had undergone a trial shortly before he was summarily executed by the mob. He had been found "not guilty" by a jury verdict which was due, at least in part, to the unflinching efforts of Vincent Brocato and Greek Rice, both then fresh out of law school, who had been appointed by the court to serve as Coleman's attorneys. The unpopularity of his cause, the intensity of the feeling against him, did not deter them in the least from seeking, and obtaining, an acquittal of their client.

Then in 1930 there came on for trial in our circuit court a case remarkably similar to the one later depicted in Harper Lee's *To Kill a Mockingbird.* Tom Hill, a Negro in his fifties, was put to trial on a charge of having raped a white woman. George Maynard, Billy Maynard, and Joe Hopkins were named by the court to defend him. That they did so to the utmost of their abilities, and in the finest

*Attorney at Law, Clarksdale, Mississippi.

[1]Schulman, *Clarksdale Customs* in SOUTHERN JUSTICE 107 (Friedman ed. 1965).

traditions of the legal profession, is attested by the fact that the jury, despite the prosecutrix' damning testimony, was unable to arrive at a verdict after days of deliberation. A mistrial had to be ordered. Tom Hill died a natural death about a year after his trial, without having had to go through a second trial.

Two murder cases which give the lie to the canard that no Mississippi lawyer would dare move to challenge a jury from which Negroes have been systematically excluded, even though it would be to the advantage of his client that that be done, were tried in Clarksdale during the September 1935 term of court. They were styled *State v. Moon* and *State v. Pearson.* The writer was the court-appointed attorney for Roosevelt Moon. Pat Holcomb was named by the court to defend Fedro Pearson.

Moon and Pearson were itinerant Negroes who passed through Clarksdale in the summer of 1935, on their way to or from St. Louis. While in Clarksdale, they decided to rob a small grocery store located about a mile out of the city limits. In carrying out their design, one or the other of them shot and killed the seventy-year-old storekeeper, a respected white man by the name of J. C. Parker. They were almost immediately apprehended, and shortly thereafter confessed their crime.

The best that the defendants' attorneys could hope for was life sentences for their clients, which appeared to the attorneys to be possible if the cases could be tried in a calm atmosphere. After all, the defendants' intentions were to rob the store, not to kill Parker, and whichever of them actually did the shooting (each blamed the other) did so after Parker had himself pulled the fatal weapon and probably during a tussle over it. But the atmosphere at the term of court which convened in September 1935 was anything but calm. The crime was too fresh in the public mind, and the initial indignation and resentment over what appeared to be a senseless and wanton murder of an elderly white gentleman by two young, brazen, out-of-state Negroes, had not spent itself. That meant, since evidence to support a motion for a change of venue could not be obtained, that every effort had to be made to secure continuances to the next term of court.

As might be expected, the state's attorneys were as anxious for early trial as defendants' attorneys were for continuances. The result was that the court could not be persuaded to continue the cases. That left the defendants' attorneys with but one weapon: a motion to quash the indictments on the ground that Negroes had been systematically excluded from the grand and petit juries of Coahoma County. Such a motion was filed in both cases.

Despite the fact that there could be no question about the soundness of the motions (Negroes have always been freely allowed to become

qualified electors of Coahoma County and thus to achieve eligibility for jury service, but up to then none had served on a jury), the state would not confess the motions. Proof to sustain the motions had to be —and was—made. The court thereupon sustained the motions, quashed the indictments, quashed the jury boxes, and directed the Board of Supervisors to make up a new jury list. Since the trial of those cases —some thirty-one years ago—our jury lists have always included a fair number of Negroes.

In 1944, Jessie Oliver Wright, having been indicted by the grand jury of Coahoma County for the rape of a young white waitress, was brought to trial. Billy Maynard and Stovall Lowrey were charged by the court with the duty of defending him. The temper of the people was shown by the fact that the defendant had been transferred to the Hinds County jail immediately after his arrest, for safe keeping, and that the court thought it necessary for outside help to be brought in to insure the maintenance of law and order.

Wright's trial took five days. Again the Clarksdale lawyers proved their commitment to the proposition that every defendant, regardless of how unpopular his cause may be, is entitled to a fair trial. But despite their efforts, the jury returned a verdict of guilty and he was sentenced to death by electrocution.

An appeal was taken to the Supreme Court of Mississippi.[2] There Wright's case was presented with such skill and learning that the result was almost total victory. His conviction was reversed in an opinion which practically guaranteed that the case would be nol prossed as soon as it was returned to the trial court—which is what happened.

The Lee Arthur Casey case grew out of the 1945 indictment of Casey, a Negro, for the murder of a prominent Coahoma County white citizen. Tom Ross and George Maynard were court-designated attorneys for the defendant. The case was a most difficult one to defend because Casey's actions, at the very least, had much to do with bringing about the death of decedent. It was not surprising that defendant, although given the most skillful and dedicated defense possible under the circumstances, was found guilty and sentenced to death by electrocution.

Casey's attorneys continued their fight for their client in the Supreme Court of Mississippi.[3] There they were more successful. His conviction was reversed and his case remanded to the trial court. Once it was back in the trial court, his attorneys were able to secure the reduction of the charge to manslaughter.

Rufus Willis was indicted by the grand jury, at the January 1947 term of our circuit court, for the rape of a white woman. The writer

[2]Wright v. State, 198 Miss. 211, 22 So. 2d 1 (1945).

[3]Casey v. State, 23 So. 2d 403 (Miss. 1945).

and the late W. W. Venable were appointed by the court to defend him. It was a most difficult assignment because Willis had confessed to the officers and others that he had attempted to rape the prosecutrix at the time and place mentioned in the indictment, and his defense to the charge was that his efforts to commit the crime of rape had been thwarted by the efforts exerted by the prosecutrix to prevent him from accomplishing his design. It was evident that he would have to take the stand and state to the jury the facts of his attempted rape.

In the voir dire examinations of the panel, the writer sought to cull those who, in order to insure what they undoubtedly thought would be the proper punishment for defendant's actions, would convict for the accomplished crime even though they believed it had not been consummated. The voir dire examinations took all the morning. During that time, prosecutrix' husband was in an anteroom peering into the courtroom. He was armed with a pistol and was drinking intoxicants. As defendant was being taken out of the courtroom for the noon recess, prosecutrix' husband pulled his pistol and made an effort to get to the defendant. He was prevented from shooting the defendant and was disarmed, but he was not put under arrest. During those happenings, he exhibited great animosity towards all having anything to do with the trial.

When court reconvened for the afternoon session, the defendant's attorneys, who, incidentally, had been warned not to return to the court room, moved the court for a mistrial. It was granted, as was the subsequent motion for a change of venue. Willis was later tried in Vicksburg, Mississippi, with Vicksburg counsel assigned to his defense, found guilty, sentenced to death by electrocution, and electrocuted.

In 1948, the late Cage Brewer and John Webb were put to the test when they were required by the court to defend a Negro, by the name of William Bell, who was charged with having murdered a white plantation manager. Although they did not succeed in convincing the trial court or the jury that Bell had acted in self-defense (which is not too difficult to understand since deceased made no overt act toward harming defendant on the immediate occasion of the killing) and the defendant was sentenced to death by electrocution, they were successful in persuading the Supreme Court of Mississippi that the defendant should have been given a directed verdict,[4] and the defendant is today alive and a free man because of their efforts.

Additional cases could be cited as proof that the members of the Clarksdale Bar honor their obligation "never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed"; but they would be redundant, for the cases cited should prove

[4]Bell v. State, 207 Miss. 518, 42 So. 2d 728 (1949).

the point. I know of none that could be cited to the contrary.

True, the cited cases are not civil rights cases. But each one of them had racial implications of far graver consequences than piddling cases involving sit-ins, or demonstrations, or some such contemptable activity. To charge that a lawyer who would go all-out in the defense of a Negro murderer of a white man, or a Negro rapist of a white woman would be afraid to represent a civil rights worker in a minor criminal case is to talk nonsense.

The truth of the matter is that civil rights cases are not lawsuits at all and those involved in them do not desire legal representation as that term is generally understood. At least that was the impression I got from one of the workers who came to see me after I had told her over the phone that I was open to employment in any legitimate lawsuit. Our conversation went something like this:

Q: Do you understand what you are charged with?
A: Yes.
Q: Are you guilty?
A: Yes.
Q: Does the city have any witnesses to prove your guilt?
A: Yes.
Q: Do you intend to perjure yourself by taking the stand and denying your guilt?
A: No; I couldn't do that.
Q: Well, what do you think I, or any other lawyer, can do for you?
A: Do what a lawyer usually does.
Q: In a case such as yours, a lawyer would usually enter a guilty plea for his client, after first trying to arrange for the lightest possible sentence. Do you want me to do that?
A: No; I don't want to plead guilty.
Q: You can, of course, attack the constitutionality of the ordinance, but if you do that you should be prepared to carry an appeal to a higher court, and that will cost money. Do you want to take that course?
A: No; I don't have the money for that.
Q: Well, I ask you again, what do you think I can do for you?
A: Do what lawyers usually do.

The fact of the matter is that she didn't want a lawyer to represent her in the matter of determining her guilt or innocence. What she wanted was a propagandist who would use her case as a platform from which to launch an attack against our social order. No lawyer worthy of the name would lend himself to any such project; certainly not if he was not himself at war with our social order and bent on its destruction.

This conviction is substantiated by what is said in the foreword to "Southern Justice." It is there stated that a lawyer who finds himself professionally engaged by a civil rights worker must "see his responsibility as different, almost in kind, from what it has been in other times and other settings."[5] Such a lawyer, it is said, must "see himself as engaged not by a client, but a cause."[6] Well, the members of the Clarksdale Bar—fair-minded men who are much more conversant with the basic facts than those who distort them beyond recognition—see no validity in the so-called "cause" and have no intention of enlisting under its banner.

The civil rights worker I have just mentioned is the only one who ever approached me for direct representation. However, the writer has responded to reasonable pleas for help from out-of-state lawyers. Witness these paragraphs in a letter from John H. Doyle, III, of the Lawyers' Committee for Civil Rights Under Law:

> Dear Mr. Luckett:
>
> This is a belated word of thanks for your invaluable assistance in arranging for a postponement of further action by the county attorney to enforce § 2018.6 of the Mississippi Code. I have written to Judge Clayton, informing him of the status of our suit for injunctive relief, indicating that the information submitted is in confirmation of your oral report to him, made on or about August 2, 1965.
>
> We believe that your role in this case was a commendable exercise of professional responsibility. Your help has strengthened our Committee's commitment to its policy of working wherever possible in cooperation with the local bar in cases referred to us.

It is reasonably certain that other Clarksdale lawyers have assisted in other such matters. Certainly they would have had they been called on.

A July 1964 case against Reverend Rayford for driving while intoxicated is referred to in the *Southern Justice* chapter on "Clarksdale Customs," with the inference that it was a trumped-up charge resulting from his driving two white civil rights activists to Memphis, Tennessee. If the Clarksdale police are given to manufacturing charges against Negroes because of their civil rights activities, it is more than passing strange that they waited until July 1964 to fabricate the charge against Reverend Rayford, for he was notorious in the civil rights movement long before July 1964. The records in the United States District Court in Clarksdale will show, for instance, that he was one of two plaintiffs in an action filed April 11, 1963, to integrate the Clarksdale swimming pools, libraries, hospital, and public playgrounds.

Another action referred to in the chapter is the 1964 case against

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[5]Howe, *Foreword* to FRIEDMAN, SOUTHERN JUSTICE at vii (1965).
[6]*Ibid.*

Reverend Goodloe for selling mortgaged property without satisfying the secured debt. But no mention is made therein of the fact that he pleaded guilty to a similar offense the year before, that the man Anderson who is said to have taken possession of the property in question denied having done so, or that Reverend Goodloe has never paid his debt. Perhaps the position is that a civil rights worker does not have to pay his honest debts.

The Rayford and Goodloe stories illustrate the standard alibi of civil rights workers: any charge against one of them must have been triggered by their civil rights activities. They seem to think that those activities cloak them with immunity from prosecution for law violations. Knowing that they stand no chance of "hoodwinking" the local lawyers who know them only too well, they peddle their absurdities to gullible outsiders—with considerable success, judging from the book's chapter on "Clarksdale Customs."

Complaint is also voiced that our lawyers do not view the efforts of the civil rights workers "sympathetically." To that indictment, we plead guilty. We view those efforts as harmful, as destructive of good racial relations, and as an intolerable intrusion into our affairs by a group which has no real concern for the welfare of our community.

We know that our social order is not perfect, that it has many defects. But we also know that, given the materials which have to go into it, it is about the best that can be constructed and that it comes pretty close to meeting the needs of those whom it must accommodate. Remember that the form of anything which has to be constructed—be it a social order, or a bridge, or a house—depends on the materials with which one has to work. For that reason, all social orders are defective, because all social orders are made of defective material. And that which finally determines the shape of a social order is the people who make up that particular society.

Never forget that throughout most of the history of Coahoma County, Mississippi, Negroes have comprised almost seventy-five percent of the population. For that reason, our social order differs from the social order that developed in other sections of the country, *e.g.*, New England, where Negroes in communities the size of Clarksdale are virtually unknown. Had New England our racial set-up, and we its, probably segregation would be its way of life and our busy-bodies would be harassing them. New England would be protesting that, given its social composition, its way of life was what suited its people. New Englanders would be pointing to the difficulties which people, with far less differences than Caucasians and Negroes, encounter when they have to live side by side; for instance, the English and Irish, the Greeks and Turks on Cypress, and the Jews and Arabs in the Near East.

Our social order grew out of a social fact, which simply means that

our way of life almost automatically fashioned itself in the way that suits most of our people. It takes into account the fundamental fact that the deep-lying attitudes of a people are beyond anybody's control. It recognizes that we grew into the kind of people we are today through the centuries, that out of our own special psychological, social, and economic attitudes and needs—rooted in the sort of people our fathers were and the situations in which they found themselves, and changing under the hammering of events—conditioned by our sectional memory and shaped by the events which have happened to us and our fathers—we are what we are today. It does not deny that reality, or ignore our past, or refuse to take into account the attitudes which we ourselves cannot change. It adjusts itself to the fact that the unique composition of our community requires an environment which permits each of two very dissimilar races to develop that way of life which is most satisfactory to it.

Egalitarians contend that our way of life denies the equality of man. But that is not so. We recognize that all men are equal in the essential fact that they are all equally men and entitled to be treated as human beings, as men. But we do not close our eyes to the obvious fact that in all other respects they are not equal—not all men, not any two men—in any single human attribute. Men are equal in the same way as all triangles are equal. Every triangle has three sides, in every one any two sides are greater than the third side, and the angles of every triangle total 180 degrees. But some triangles are made of gold, some of diamonds, and some of putty. In man it is the same: there is accidental inequality—of strength, intelligence, energy, skill. That a man is made in the image of God does not of itself mean that he can teach, or build bridges, or manage finances, or perform the duties of a juror. It does not even mean that he can vote intelligently. All these things and a thousand others are *functions,* which must be performed adequately or society will suffer; and no man can perform them merely by virtue of being a man. It is no insult to human equality to say that certain men within the body politic are not equipped for the fullness of citizenship. It is simply a question of fact—are they or are they not so equipped?

If the answer is no, then those who are not equipped for the fullness of citizenship are not entitled to some of its privileges. The right to vote, for instance, should be dependent on one's qualification to exercise such right intelligently. For the man who has not taken the trouble to equip himself to vote, or who is so handicapped that he cannot do so, there is a duty not to vote. Democracy is no magic formula by which decisions are extracted from blank ignorance.

For those who are equipped for the fullness of citizenship there is, of course, the duty to do what can be done to eliminate the defects in

the social order. But those efforts must come from within the community; for however bad a community may be in creating its own social order, any group from another community, meddling, will only make it worse. Those civil rights workers with impeccable credentials and good intentions—and there were some who fit such a description—should remember that truism and confine their uplifting efforts to where they came from. The reports we get from their home communities indicate they left some of their homework undone.

Do-gooders have various motivations. Some simply dislike the present arrangement of things and want to rearrange them to their own satisfaction. Others have a passion for interfering. Still others—and they are the ones who do the most harm—are good, sincere, well-intentioned people who want to bring about utopia. But regardless of their motivations, Chesterton's commentary on their type expresses our hopes for them:

> Abou Ben Adhem may his tribe decrease
> By cautious birth control and die in peace.

SOUTHERN JUSTICE

*John H. Doyle III**

These comments are based largely upon my experience during the past ten months in the Jackson, Mississippi, office of the Lawyers' Committee for Civil Rights Under Law.[1] They are addressed principally to those Mississippians, white and Negro, who earnestly seek to improve Southern justice by working toward a society free of illegally maintained racial discrimination. My remarks are meant to serve as a reminder that the very significant progress toward equal rights made in recent years was made possible by the vigorous enforcement of federal legislation and federal court orders, and as a warning that a relaxation of national pressure will leave undisturbed in substance (although modified in form) the abuse of state power and the unwritten law of violence and intimidation which keep the Negro "in his place." The views expressed here are entirely my own, and do not constitute an official statement of the views of the Lawyers' Committee for Civil Rights Under Law.

My conclusions do not suggest any deprecation of the efforts of many to achieve reform locally, through the public and private institutions of the state and of local communities. On the contrary, my suggestions are intended to point to methods by which local moderate opinion and energies can be released and be allowed to have a free hand. My views are influenced by observation of the continuing suppression of liberal opinion through intimidation and ostracism of those who "take a stand,"[2] and by a conviction that an expansion of national efforts, including federal coercive measures as well as of the contributions of the national Bar, clergy, and other private groups, will be necessary to

*Lawyers' Committee for Civil Rights Under Law, Jackson, Mississippi.

[1]The Lawyers' Committee for Civil Rights Under Law was formed at a White House meeting with President Kennedy of two hundred fifty leading members of the Bar in June 1963. At President Kennedy's request, Harrison Tweed and Bernard G. Segal assumed joint responsibility, as co-chairmen, for the formulation and implementation of the Committee's program. Under their leadership, and that of Whitney North Seymour and Burke Marshall, who succeeded them as co-chairmen in August 1965, the Committee has worked closely with state and local Bar associations in carrying out programs for the solution of civil rights problems on the state and local levels. In June 1965, the Committee opened a regional office in Jackson, Mississippi, to provide legal assistance without fee in civil rights cases and to work with the Mississippi State Bar in seeking to assure adequate representation for all persons within the state. Berl I. Bernhard is Executive Director of the Committee, and Denison Ray is Chief Counsel of the Committee's Jackson office, having succeeded Richard E. Tuttle, who served in that capacity until May 31, 1966.

[2]See, *e.g.*, CARTER, SO THE HEFNERS LEFT MCCOMB (1965).

upset the dominance of those who wield their power to preclude the free play of expression and political action.

My remarks point to an expansion of national efforts because the suspension of governmentally imposed obstacles to the free exercise of the franchise by Negroes, accomplished by the Voting Rights Act of 1965,[3] leaves in the control of racist elements sufficient remaining instrumentalities of power to assure, in the absence of renewed national programs of reform, a system of state-supported restriction of Negro political and community participation for the indefinite future. This conclusion follows necessarily from the facts: (a) that the process of consolidating the Negro vote by overcoming the obstacles of violence and intimidation and by arousing political consciousness is gradual and painstaking; (b) that political and economic power continues to reside in the hands of men committed to a state-structured system of white supremacy; and (c) that these men are now engaged, and will continue to engage, in legislative and collective private acts designed to minimize the impact of the Negro vote and to perpetuate state and local spheres of government and community structures which exclude both Negro and liberal white participation on a meaningful scale. The remarks which follow are set forth with a view to spelling out the guidelines for averting the catastrophe of a second "redemption" of the South from national legal norms[4] by the unimpeded operation of the forces referred to in (b) and (c) above.

The central contemporary documents for the study of Southern justice are the 1965 *Report on Law Enforcement in the South* and the 1965 *Report on Voting in Mississippi,* both published by the United States Commission on Civil Rights (hereinafter referred to as the "Commission"), together with the transcripts of the hearings held in Jackson, Mississippi, in February 1965.[5] In addition, there is a rich body of recent commentary of which four or five volumes taken together provide an excellent overall view of the current problems relating to Southern justice.[6] In particular, the work *Southern Justice*[7] consists

[3]42 U.S.C.A. § 1973(a)-(p) (Supp. 1965).

[4]See WOODWARD, THE STRANGE CAREER OF JIM CROW 4 (2d rev. ed. 1966).

[5]UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965) (hereinafter cited as REPORT ON LAW ENFORCEMENT); UNITED STATES COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI (1965) (compiled from hearings held in Jackson, Mississippi, Feb. 16-20, 1965) (hereinafter cited as VOTING IN MISSISSIPPI); UNITED STATES COMMISSION ON CIVIL RIGHTS, ADMINISTRATION OF JUSTICE (1965) (compiled from hearings held in Jackson, Mississippi, Feb. 16-20, 1965) (hereinafter cited as ADMINISTRATION OF JUSTICE).

[6]BARRETT, INTEGRATION AT OLE MISS (1965); HUIE, THREE LIVES FOR MISSISSIPPI (1965); LORD, THE PAST THAT WOULD NOT DIE (1965); MORGAN, A TIME TO SPEAK (1964); SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964).

[7]Edited by Leon Friedman (1965).

of a series of essays written by attorneys who have served for varying periods of time as volunteers in civil rights cases in the South, with a foreward by Mark deWolfe Howe and an article of superb scholarship by Louis Lusky entitled *Racial Discrimination and the Federal Law: A Problem in Nullification.* This volume gives in many parts eloquent expression of the sense of outrage felt by attorneys who take the role of advocate for persons engaged in the civil rights movement in the South, and is cited occasionally throughout this article.

The term "Southern justice" is here taken to mean the judicial process as revealed in the conduct of the courts, prosecutors, judges, and private Bar, examined to ascertain the protection afforded to the free exercise of legal and political rights by all persons. Although considerable discussion is devoted to spheres of conduct other than the judicial process strictly understood, the article focuses on the redress available through the courts for the denial of fundamental rights arising from racial discrimination whether practiced by state officers or private persons.

As my experience in civil rights litigation has been limited to Mississippi, much of my commentary relates to that state. A reading of the decisions cited and the works mentioned throughout the article suggests that the problems in Mississippi exist to a greater or lesser degree throughout the South, which I understand to include those Southern states affected in their entirety by the Voting Rights Act of 1965.[8]

I. Obstacles to the Realization of Equal Justice

With a remarkable sensitivity to nuance, Gunnar Myrdal expressed in 1944 the following reasons for the failure of the Southern courts to accord equal rights to Negroes:

> The popular election of the officers of law and the jury system are expressions of the extreme democracy in the American handling of justice. . . . It [the extreme democracy] causes . . . the gravest peril of injustice in all cases where the rights of persons belonging to a disfranchised group are involved, particularly if this group is discriminated against all around and by tradition held as a lower caste upon whose rights it has become customary to infringe. The extreme democracy in the American system of justice turns out, thus, to be the greatest menace to legal democracy when it is based on restricted political participation and an ingrained tradition of caste suppression. Such conditions occur in the South with respect to Negroes.[9]

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[8]Alabama, Georgia, Louisiana, Virginia, and South Carolina.

[9]Myrdal, An American Dilemma 524 (Twentieth Anniversary ed. 1962). (Emphasis omitted.)

> Part of the explanation of why the Negro gets more legal justice in the North is the fact that Negroes can vote in the North and, consequently, have a share in the ultimate control of the legal system. *Nevertheless, the importance of political participation as a cause of equality before the law should not be exaggerated.* The lack of discrimination in both respects has a common cause in a general inclination of white people in the North to regard Negroes as full citizens in their formal relations with public authority, even if not in economic competition or social intercourse. This is one point where the ordinary Northerner is unfailingly faithful to the American Creed. He wants justice to be impartial, regardless of race, creed or color.[10]

The discrimination referred to by Myrdal takes its most pronounced form with respect to persons actively involved in civil rights activity: the "uppity" Negro and the outside agitator. Similarly it exists in the case of crimes of violence committed by Negroes against white persons. In a less aggravated form it affects the treatment accorded to the Negro in the courts in certain relations antagonistic to the white litigant, and particularly where the case concerns a relationship that has been traditionally paternalistic, such as that between sharecropper or tenant and plantation owner. With regard to the relationship among Negroes exclusively, crimes and civil wrongs are often accorded lighter punishment than would be the case with respect to the identical relationship among whites.[11] The apparent primary cause of all these forms of discrimination is the conviction, held with a moral fervor and carried over from the apologetics of slavery, that the Negro is inherently of a lower biological order, equipped with a less developed intelligence, character, and maturity than the white.[12] The invidious treatment of the Negro is permitted to persist by historic disfranchisement of Negroes as a class.

A. Law Enforcement Officers and Prosecutors

The February 1965 hearings of the Commission were marked by overwhelming evidence that law enforcement officers in Mississippi and certain other Southern states fail adequately to investigate crimes of racial violence, punish by arrest or intimidation persons who report such crimes to them, fail to protect Negroes from preventable acts of violence, and ally themselves or publicly express sympathy with extremist racist groups.[13] Moreover, it was shown that prosecutors often abdicated their duty to prosecute the perpetrators of racial crimes, and in some instances permitted the grand jury to act without having notified the

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[10] *Id.* at 529. (Emphasis added.)

[11] *Id.* at 551.

[12] See, *e.g.*, SILVER, MISSISSIPPI: THE CLOSED SOCIETY 149-50 (1964).

[13] See REPORT ON LAW ENFORCEMENT at 174.

victim of the crime to appear.[14] Similarly, law enforcement officers were found to arrest civil rights workers and hold them on excessive bail, on charges either groundless in fact or involving constitutionally protected conduct.[15]

Experience within the past year does not indicate a substantial diminution of these problems. No state court prosecutions have been instituted against the murderers of three civil rights workers killed in Neshoba County in June 1964, or of NAACP leader Vernon Dahmer in Hattiesburg in January 1966, nor against the assailants of Donald Thompson, a Unitarian minister shot in the back in Jackson in August 1965, or of George Metcalfe, NAACP Natchez leader who suffered severe injuries as the result of the explosion of a bomb wired to his automobile in September 1965 (although federal charges are pending in the former two cases). The foregoing are the major racial crimes committed in Mississippi since the spring of 1964. Similarly, there has been virtually no state court prosecution with respect to scores of lesser racial crimes, including beatings, bombings, shootings, and arson.

It is unquestionable that hostility to civil rights activities on the part of law enforcement officers and prosecutors is a major reason for patterns of inaction with respect to prosecutions for racial crimes.[16]

However, it must also be recognized that the unwillingness of many members of the community honestly to reveal in court their knowledge of racial crimes impedes successful prosecution in numerous cases. As will be noted below, the very prevalent sentiment that the civil rights activitist has "provoked" the crime of which he is a victim provides for many persons a moral justification for remaining silent in their knowledge of unlawfulness. Prosecuting attorneys in Mississippi often encounter cases in which the identity of the criminal has been revealed by word of mouth. Nevertheless, prosecution in such cases in the absence of an admission or of objective evidence is very often impossible.[17]

The incidence of harassment arrests and private acts of racial violence has decreased in the months following the summer of 1964, the period to which the Commission directed its attention. This decrease is due in part to the fact that civil rights activity, and concomitantly the provocation to violence or arrest, has significantly decreased in scope. The summer of 1964 was marked by intensive state-wide activity of the Council of Federated Organizations, a combined program of national civil rights organizations which entailed the temporary recruitment of

[14]See *id.* at 50-52.

[15]See *id.* at 57-83. See also FRIEDMAN, SOUTHERN JUSTICE 37-74 (1965).

[16]See REPORT ON LAW ENFORCEMENT at 174.

[17]See the discussion of the Mack Parker case in SILVER, *op. cit. supra* note 12, at 8 n.2.

many hundreds of civil rights workers, most of whom were students. Many of the civil rights workers have left the state since that time. Moreover, there are indications in many areas that local Negro support for direct action programs of voter registration and demonstrations has been curtailed.[18] This certainly appears to be in part a reaction to the arrests, assaults, bombings, and other forms of intimidation which the Commission noted with respect to the summer of 1964. In an important sense, therefore, the violence of that summer has proven effective.[19]

It is a discouraging fact that state and local officials continue to employ the power of arrest and prosecution to punish persons engaged in civil rights activities for the exercise of rights of free speech and assembly guaranteed by the first and fourteenth amendments. Indeed, it does not appear that any diminution of these practices is indicated in the near future.

On March 8, 1966, the United States Court of Appeals for the Fifth Circuit issued an injunction restraining officials of the City of Jackson from denying to Negro citizens their right of protest by peaceful and non-obstructive picketing and walking along public sidewalks to protest racial discrimination, and from denying to Negro citizens equal access and treatment in any place of public accommodation or publicly maintained or operated facility.[20] The Court found:

> that some of the defendants, on a number of occasions did pervert laws of the State and ordinances of the city from their rightful usage and did use them to deny to plaintiffs rights to which they were entitled under the Constitution and laws of the United States.[21]
>
> Nor have we any reason to believe that there is any intention on the part of defendants to desist from such conduct in the future.[22]

The incidents referred to took place in 1963. In June 1965, nearly one thousand persons were arrested in the City of Jackson for engaging in the same conduct held protected from interference by city officials in the above-mentioned case. The adult prisoners, numbering close to five hundred, were detained under $100 bond for an average of two weeks until cash bail was provided for their release. While the prisoners

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[18]Perhaps the most reliable indication of the failure of the movement to sustain itself and to grow in effectiveness is the poor voter registration record which has followed the enactment of the Voting Rights Act of 1965. See UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT—THE FIRST MONTHS (1965).

[19]See HUIE, *op. cit. supra* note 6, at 236-37.

[20]NAACP v. Thompson, No. 21741, 5th Cir., March 8, 1966.

[21]*Id.* at 3. It should be added that the court also found that the plaintiffs had on many occasions violated valid state laws and municipal ordinances.

[22]*Id.* at 15.

were in custody the Fifth Circuit issued an injunction[23] pending appeal restraining state officers along lines set forth in *NAACP v. Thompson.*[24] The facial constitutionality of the Jackson ordinances requiring permits for "parades" and for the distribution of handbills and leaflets, as well as the firmly established Jackson policy of "instant arrest," are now under challenge in the Fifth Circuit.[25]

In early October 1965, a group of over three hundred persons was arrested in Natchez, Mississippi, pursuant to an ordinance substantially identical with the Jackson ordinance referred to, for engaging in protest activity of the type for which the Jackson arrests had been made, and transported over 200 miles to Parchman penitentiary where they were detained for an average of three days. A civil action for damages in an amount close to $1,000,000 has been filed against several defendants on behalf of a number of the persons who were sent to Parchman, alleging that officials of the State of Mississippi and of the City of Natchez caused the prisoners to be subjected to brutality and humiliation.[26] In March 1966, a group of approximately 200 persons was arrested by officers of the Mississippi Highway Safety Patrol and imprisoned over 24 hours for a peaceful march along the side and shoulder of State Highway 552 to protest alleged discriminatory practices at Alcorn A & M College. Shortly thereafter a federal district court temporarily restrained state officers from so interfering with a second protest march along this highway.[27]

B. The Courts

Before giving consideration to the operation of the court system, it is important to point out that much of the harm caused by harassment arrests is irreparably inflicted prior to trial. The punishment implicit in arrest and detention on bail has a deterrent effect on the exercise of rights of free speech and assembly whether or not the prosecution is ultimately dismissed.

The Fifth Circuit Court of Appeals, in deciding whether plaintiffs in *NAACP v. Thompson* had an adequate remedy at law, noted:

> This question gives us concern. We are unwilling to impute to the courts of the State an intention to deprive plaintiffs of any right to which they are entitled under the laws of the State

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[23]Guyot v. Pierce, No. 22733, 5th Cir., June 30, 1965 (Strother v. Thompson consolidated for purposes of hearing on injunction).

[24]*Supra* note 20.

[25]Guyot v. Pierce, No. 22990, 5th Cir.; Strother v. Thompson, No. 23033, 5th Cir. See generally Honnold, *The Bourgeois Bar and the Mississippi Movement,* 52 A.B.A.J. 228 (1966).

[26]Anderson v. Nosser, Civil Action No. GC669, N.D. Miss.

[27]Evers v. Birdsong, S.D. Miss., order entered March 11, 1966.

> or of the United States, however out of sympathy with some of those laws the court may be. We assume we can rely on them to safeguard the rights of those brought before them for trial. [citations omitted.] But this does not protect plaintiffs from harassment and intimidation by the law enforcement agencies of the city, county, and State. It does not protect them from arrest *en masse* on frivolous or unfounded charges; it does not protect them from continued arrest and incarceration until bond could be deposited for their release; it does not protect them from the long delay occasioned by the insistence of the prosecution that each one of the hundreds arrested be tried separately; it does not protect them from often expensive litigation until their rights are finally vindicated; it does not protect them from being frightened away from the lawful assertion of their rights and lawful protest against the continued denial of them.[28]

In his separate statement to the Commission's Report on Law Enforcement, Dean Erwin N. Griswold of Harvard Law School said:

> The Negro, and his supporters, march in the street not because the law is not clear, but because it has not been followed. He knows from long experience that a resort to the courts will far too often result, initially, in delay, frustration, injustice, and denial of clearly defined rights. It is small comfort to him that three years later he will get justice from the Supreme Court of the United States. Justice—true and real justice—should be dispensed by voting registrars, sheriffs, the police, school boards, district attorneys, justices of the peace, and the others close at hand who represent the authority of the State, and who use their authority far too often to perpetuate a system of social control, which may represent what has been regarded as the southern way of life, but which is wholly inconsistent with rights established by valid Federal power as a part of the supreme Law of the land.[29]

The fundamental obstacle to the securing of equal justice in Southern courts is the antagonism of judges and white juries toward the provocative posture of civil rights workers and Negroes who seek to exercise basic rights of citizenship. Charles Morgan, Jr., of the Birmingham Bar and currently with the American Civil Liberties Union in Atlanta, has well described the operation of the Southern courts as follows:

> No, the systematic exclusion of Negroes from juries was only one element that might deny due process and equal protection to a Negro defendant in Alabama. The operation of our jury system was but a single thread woven through the whole fabric of segregation as a way of life and a social order. Directly and indirectly, consciously and unconsciously, by ways

[28]NAACP v. Thompson, *supra* note 20, at 16.

[29]REPORT ON LAW ENFORCEMENT at 186-87.

> both harsh and subtle, our state's legal system reflected and provided the bulwark for a social system that treated Negroes as lower-caste citizens.[30]

It is unfortunate that law enforcement as it affects the civil rights movement in the South today consists of a systematic program of controlling and suppressing the activity of civil rights workers so that they will not provoke the white community to violence. Similarly, crimes of reprisal or deterrence directed against civil rights workers are condoned as merely a result of "provocation." This mode of thought is reflected in the 1964 decision of the Supreme Court of Mississippi affirming the lower court conviction of a freedom rider who was arrested upon his arrival in Jackson in 1961. In an opinion reversed per curiam by the United States Supreme Court on March 26, 1965,[31] the Supreme Court of Mississippi, upon noting the existence of an "antagonistic" crowd of whites awaiting the freedom riders, observed:

> In the case at bar the defendant not only knew the situation but he came to the South for the deliberate purpose of inciting violence, or, as he put it, 'for the purpose of testing the Supreme Court decision in regard to interstate travel facilities.' He left a trail of violence behind him in Alabama. The jury was, therefore, warranted in finding that he intended to create disorder and violence in Jackson, and that, in fact, disorder and violence were imminent at the time when Thomas refused to obey the police officer's order to move on.[32]

The tendency to view the exercise of a federal right as synonymous with criminal provocation to violence is given further emphasis by the court's comment that conduct as engaged in by the defendant has caused riots such as that which occurred at the University of Mississippi on September 30, 1962:

> Under the authorities of this state, this Court can take judicial notice of historical facts. [Citations omitted.] This Court does take notice that the citizens of Mississippi later (September 30, 1962) underwent the shock of such a riot at the University of Mississippi, in which lives were lost and property was damaged. The President of the United States sent into Mississippi some 32,000 regular army troops, and these troops remained in Mississippi for many months.[33]

It appears that the only course of conduct which would satisfy the criteria of lawfulness laid down by the Mississippi court would have required that James Meredith and others of his race refrain from

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[30]MORGAN, *op .cit. supra* note 6, at 116.

[31]Thomas v. Mississippi, 380 U.S. 524 (1965).

[32]Thomas v. State, 160 So. 2d 657, 664 (Miss. 1964).

[33]*Id.* at 663.

attending the University of Mississippi. This formulation of the court echoes in explicit terms the attitude which is daily encountered in the courts by civil rights workers or Negroes exercising basic rights.

Moreover, the pernicious results of this attitude are magnified in cases in which, unlike *Thomas v. State*[34] where the facts are essentially undisputed, conflicts in testimony leave the final disposition to the trier of fact. In such cases, in which citizens who may otherwise be scrupulously honest are strongly tempted to be less than candid in defense of the Southern way of life, the unpopular litigant is effectively foreclosed from review of determinations of fact made by judges or juries who deem his conduct socially dangerous and subversive of the most sacred values.

The systematic exclusion of Negroes from juries compounds the difficulty of securing determinations of issues of fact consistent with equal protection of the laws.[35] Numerous state court convictions are overturned on this ground, despite the efforts of public officials to take prompt steps to correct the situation. The problem is very fundamental because the Boards of Supervisors of the several counties of Mississippi are vested with a broad discretion over the selection of qualified jurors, a discretion often abused to exclude Negroes on other than a token basis. Moreover, the category of eligible jurors is limited by statute to qualified electors, or, upon order of the circuit court, may be extended to include resident freeholders (although the latter is rarely done).[36] Until passage of the Voting Rights Act of 1965, almost all Negroes in the state were disfranchised and for that reason were ineligible to serve as jurors. This Mississippi procedure for the selection of jurors is under attack in a civil action filed with respect to Sharkey County.[37]

C. Ambiguity of the Federal Presence

The presence of federal officers in the South working in cooperation with local law enforcement officers on cases of racial violence has created serious confusion as to who is responsible for the investigation, arrest, and punishment of the criminals in question. The state and local officers called before the Commission in Jackson testified that agents of the FBI actively cooperated in the investigation of the crimes which

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[34]160 So. 2d 657 (Miss. 1964).

[35]See, *e.g.*, Smith v. Breazeale, 245 F. Supp. 978 (N.D. Miss. 1965); Scott v. Walker, No. 20814, 5th Cir., March 31, 1966 at 25, where the court set aside a state court conviction upon a showing that of the jury lists in question the number of Negroes did not exceed a "token number."

[36]Miss. Code Ann. § 1762 (1956); Miss. Code Ann. § 1762-01 to -03 (Supp. 1964).

[37]Willis v. Carson, Civil No. 1145(W)(R), S.D. Miss., 1966.

were discussed.[38] Nevertheless the Commission found only state and local officers responsible for the inadequate investigation of racial crimes. In the absence of testimony which would explain the failure of the FBI to find the solutions which eluded local officers, it would appear unfair to place the entire responsibility for failure upon the latter. As stated by Sheriff Warren of Pike County with respect to a number of bombings in his county:

> The FBI worked with us on these cases, right side by side with us. They made no arrests. It is just something that is hard to solve when you go out to a crime. There is no evidence, there is no description on anything, automobile, a person, anything that we could work on.[39]

Further, Chief J. T. Robinson of the Natchez Police Department testified:

> Mr. Taylor, the first thing you don't have very much to go on. I have called for assistance from the FBI. Every case of violence that we have had in the city, I have asked the assistance and I have gotten it on each case that I have called them on, and I have called them on every one of them. You don't have much to go on, as I was saying. The witnesses don't give you any clues at all and there are very few witnesses that you can come up with.[40]

It is unfortunate that the FBI agents who worked on each of the cases under discussion were not called to testify before the Commission, in as much as the lack of information available on their methods of investigation calls into question the validity of the Commission's strictures directed against state and local officers.

The confusion is redoubled by the ambiguity of the federal government's commitment to enforce the federal criminal laws against acts of racial violence.[41] It should be noted that some of the ambiguity has recently been resolved by the United States Supreme Court decisions[42] which enlarged the scope of sections 241 and 242 of 18 United States Code. Nevertheless, as expressed to the Commission in conferences and memoranda, the Department of Justice will not directly protect persons exercising federal rights, nor will FBI agents or United States marshals arrest persons for offenses committed in their presence or perform patrolling or other preventive duties in communities where

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[38]ADMINISTRATION OF JUSTICE at 18, 20-21, 42, 117, 137, 145, 147, 152, 259, 266, 270, 276-277.

[39]*Id.* at 20.

[40]*Id.* at 152.

[41]See 42 U.S.C. §§ 241, 242 (1964).

[42]See United States v. Price, 34 U.S.L. WEEK 4313 (U.S. March 28, 1966); United States v. Guest, 34 U.S.L. WEEK 4323 (U.S. March 28, 1966).

there has been substantial racial violence.[43] Moreover, the Department of Justice, in choosing cases for indictment, exercises a degree of selectivity so high as to be inconsistent with a policy of routine or uniform enforcement of the federal statutes.[44] The fact that enormous investigatory resources are apparently expended with respect to certain crimes which excite national attention, such as the Neshoba County murders and the murders of Vernon Dahmer, Viola Liuzzo, and Lemuel A. Penn, and that arrests and prosecutions follow, suggests that a "shock the conscience" test may be the operative criterion of selection.

Such a vague method of selection appears cynical to the civil rights worker who daily risks his personal security with no assurance of protection. The failure of the federal government to adopt and promulgate a strict policy of enforcement has led many persons who stand in dire need of federal enforcement to develop a bitter distrust of federal involvement.[45]

The Commission recommended the use of federal protection so as to prevent racial crime in areas where its incidence has been high.[46] The suggestion is aimed at creating a system of federal law enforcement which will function in the South as a matter of routine. Far from deflecting responsibility from local officials, a uniform federal policy of enforcement would dramatically illustrate those areas in which local law enforcement has been in default. The vagueness of the mandate presently in force has a far greater tendency to obfuscate lines of responsibility, as has been shown above.

Further, a policy of presenting evidence to the grand jury or indicting by information in all cases of clear violation of federal law, where satisfactory evidence is available to establish guilt beyond reasonable doubt to a fair jury, would reestablish sound principles of jurisprudence and public policy in this area of the administration of federal justice. The sporadic attempts at enforcement currently engaged in are compromising to federal authority. Moreover, the practice of investigating acts of racial violence without appearing to endeavor to punish those responsible gives to many the impression that the violence is condoned by federal authorities. The fact that local juries may refuse to convict in most cases where an objective jury would find otherwise should not militate against a policy of uniform law enforcement. A series of well publicized and shocking acquittals may well be the only available stimulus to the structural reforms that are sorely needed to

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[43]See REPORT ON LAW ENFORCEMENT at 143.

[44]See *id.* at 117.

[45]See generally Burns, *The Federal Government and Civil Rights* in SOUTHERN JUSTICE 250-51 (Friedman ed. 1965).

[46]See REPORT ON LAW ENFORCEMENT at 1800.

correct a situation in which the personal security of law-respecting citizens is constantly in jeopardy.[47]

II. The Quest for Solutions

A. Introduction

As has been suggested above, an effective solution to the problems discussed must be one which will assure to Negro citizens their rights as Americans. Because the obstacles to achievement of this goal in the South are so fundamental and firmly rooted, there are many arduous stages of endeavor which must be faced. The tearing away of artificial bars to the franchise is a necessary prerequisite to a solution, but it falls far short of the ultimate exertions which the nation will be required to make. The wielders of economic and political power who at the present time utilize all available resources and influence to minimize the effective granting of legal and political rights to Negroes and to silence liberal resistance should be divested of their position of dominance or made to alter their course. In the light of this minimal goal it will be fruitful to examine the solutions that are being attempted in Mississippi on the state and local level.

B. Local Steps to Achieve a Solution

1. *The Mississippi Bar*

As Dean Griswold has pointed out:

> So long as lawyers, public officials, and State courts in the South continue to distort the processes of public power so that Negro citizens may not enjoy the legal equality promised them or exercise the liberties assured them by the Constitution, Federal authority must continue to make itself felt. A central irony in the situation in which the South now finds itself is the fact that the refusal of its lawyers and its judges to fulfill their plain responsibilities has been the principal cause of the intervention from outside against which the South so vigorously protests.
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> In all of this, lawyers have a special responsibility. They are persons trained in the law, with presumably a special interest in justice. They are officers of the courts. Through their training and background, they are often elected to our legislatures, hold executives and administrative offices, as well as sit on the benches in our courts. Yet, too many of the members of the bar—it is not too much to say that most of the members of the bar in the South—have been complacent about these things. Some have been concerned, but have felt that they could not speak up, a sad commentary on the situation which so distorts the administration of justice where racial factors are involved.[48]

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[47]See Friedman, Southern Justice 228-54 (1965).

[48]Report on Law Enforcement at 184-85.

In view of the fact that terror and ostracism have been used as important tools for assuring the dominance of state-imposed racism, and in view of the unique exposure of lawyers to community opinion, it is in a sense unfair to hold lawyers to higher standards of responsibility than other leading members of society. Those lawyers who would wish to act toward establishing respect for legal norms are placed in the most extreme professional jeopardy. While the doctor or engineer who takes an unpopular position may risk the loss of clients or of employment, his skill operates upon biological or inanimate objects and may be easily practiced elsewhere or even in his own community with certain adjustments (such as a doctor who relinquishes private practice to join the research staff of a hospital). The lawyer, on the other hand, cannot effectively represent his clients if he has engendered the disrespect of jurors, judges, clerks, members of administrative agencies, and other persons connected with the operation of the law. The decision to take a step which might jeopardize his livelihood is one which cannot be glibly counseled to a lawyer in a Southern community, as recent experience has confirmed in several instances.

In the light of the very heavy odds against any involvement of the local Bar, the Mississippi Bar has taken steps which must be commended. In the spring of 1964, Bernard G. Segal, Cecil E. Burney, and Cody Fowler of the Lawyers' Committee for Civil Rights Under Law met with a group of past-presidents of the Mississippi State Bar to discuss methods by which the State Bar might in a collective fashion help to promote an atmosphere in which local representation would be made available in civil rights cases in Mississippi. Stimulated, it is believed, in part by this meeting, the State Bar adopted a resolution of July 16, 1964, which reaffirmed the commitment of Mississippi lawyers to the Bar's responsibility to provide counsel on behalf of all persons accused of crime or who seek legal redress of their grievances, whether they be indigent, unpopular, residents, or non-residents, and regardless of race or color. Pursuant to the resolution, President Earl T. Thomas on July 21, 1964, invited a distinguished group of over three hundred attorneys in all areas of the state to serve and constitute the Special Liaison Committee of the State Bar, created to implement the resolution.

Since passage of the resolution, leaders of the State Bar have worked closely with officers and attorneys of the Lawyers' Committee. In a limited program of representation by volunteers who served for periods of two weeks during the summer of 1964, numerous contacts were made by attorneys of the Lawyers' Committee with members of the Liaison Committee throughout the state. Stimulated by the reports of the volunteers that implementation of the resolution was not immediately

forthcoming, the Lawyers' Committee began to lay plans for the opening of a regional office in Jackson, in consultation with the President, President-Elect, and other leaders of the State Bar. Upon public announcement of the plans for a Jackson office by co-chairman Segal at the Conference of State Bar Presidents in New Orleans in February 1965, vigorous support for the project was voiced by Sherwood W. Wise, a past-President of the State Bar, speaking for himself and for President Thomas. Immediately prior to the opening of the Jackson office, on May 24, 1965, the Mississippi Board of Bar Commissioners formally extended its cooperation to the Lawyers' Committee's project in furnishing legal aid to those who were charged with violation of law in connection with the enforcement of civil rights when the person involved could not obtain such representation from members of the Mississippi Bar. Upon entering office as President of the State Bar in June 1965, Orma R. Smith designated George P. Hewes III of Jackson to act as liaison between the Lawyers' Committee and the State Bar. On September 9, 1965, President Smith sent to all members of the Special Liaison Committee a letter explaining the background and purposes of the Lawyers' Committee and urging members of the Special Liaison group to cooperate with the staff and volunteer lawyers of the Committee,

> in seeking to provide adequate local representation in cases which have come to their attention, and in furnishing to them advice and informal help in gaining access to our courts and resolving many of the difficulties which nonresident attorneys may encounter in a jurisdiction unfamiliar to them.

Since the opening of the Committee's office in Jackson its attorneys have kept in frequent contact with President Smith and Mr. Hewes, who have intervened on several occasions in support of Committee lawyers whose special appearance in state court was challenged under Mississippi Code section 8666. The Committee's attorneys, at the invitation of the local Bar, appeared before the Jackson Junior Bar Association in September 1965 and before the Board of Bar Commissioners in January 1966. Moreover, several criminal cases involving Negro defendants have been successfully referred to local attorneys. Significant informal help has been received from local attorneys with respect to civil rights cases for which the Committee has been responsible.

The formal steps taken by the State Bar and by several of its leaders to extend full cooperation to the Lawyers' Committee and its attorneys have been most heartening. They have facilitated the furnishing of legal representation in many hundreds of civil rights cases where it otherwise might have been unavailable. In this fashion many outstanding members of the Bar have affirmatively expressed their com-

mitment to the goal of achieving full representation in all civil rights cases.

However, Mississippi lawyers have as yet made no substantial entry into the field of legal representation in civil rights cases. An analysis of the types of cases which currently constitute the main segment of civil rights litigation will help toward an understanding of this problem. At the present time approximately 80% of civil rights litigation consists of civil rather than criminal cases. Specifically, the civil litigation is of an affirmative type, *e.g.*, actions to desegregate public schools, courthouses, hospitals, and recreational facilities; to secure equal access to public accommodations; to restrain the enforcement of statutes or ordinances which abridge the rights of free speech, assembly, and association; to recover damages from law enforcement officers, public officials, and private persons for personal injuries inflicted by acts of racial violence or false arrest; to secure the right to vote and to run for political office; and a number of other actions which similarly involve the affirmative assertion of federal rights.

That Mississippi lawyers have abstained from this type of practice results not only from the fact that it is not remunerative, but more importantly, from the aggressive nature of the representation which is involved. Such suits are generally pitched against long-standing community customs, which the Mississippi lawyer together with lawyers in most Southern states are not yet prepared to attack.

Moreover, with respect to criminal cases in the civil rights area, there remain serious limitations on the range of legal strategies within which the lawyer in the South can operate freely. In a well-known decision in 1959 the Fifth Circuit Court of Appeals took judicial notice of the fact that lawyers in many Southern jurisdictions "rarely, almost to the point of never" raise the issue of the systematic exclusion of Negroes from juries, pointing out that:

> Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism.[49]

The dangers referred to by the court persist in 1966. For this reason it is unrealistic to expect that local attorneys in the South will feel secure in raising the delicate issue of jury exclusion. It would be even more unrealistic to expect that they would feel free to employ other legal techniques which are standard in the arsenal of non-resident civil rights counsel. An important example is removal of state court prosecutions to the federal courts, a procedure which requires that the petitioner

[49]United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959).

allege that he is denied or cannot enforce in the courts of the state his equal civil rights.[50] It is commonly alleged in support of this allegation that an arrest and prosecution are intended discriminatorily to punish and deter the petitioner from the exercise of civil rights, that the judges of the state court are elected from an electorate from which Negroes have been systematically excluded, and that the State of Mississippi by statute, custom, and usage maintains a policy of racial discrimination.[51] Moreover, an attorney in civil rights cases is often obliged to bring affirmative actions to restrain the future arrest and prosecution of his clients, a situation which frequently arises in connection with activities of peaceful protest.[52]

The preceding remarks do not suggest that there are no lawyers in Mississippi or other Southern states who do not strongly oppose the illegal use of state power and private resort to violence and intimidation to deny federal rights to Negroes, and who do not wish to do all that is within their power to eliminate these evils. The ultimate solution must consist in the clearing away of those coercive factors in Southern political and professional life which impede the range of choice and action of men of conscience. The efforts which are presently being made by the Lawyers' Committee and other non-resident lawyers' organizations in Mississippi to stimulate the assumption of full professional responsibility by local attorneys should of course continue and be intensified. Together with a broad renewal of national efforts, they are necessary to lay the groundwork for an effective solution.

2. *Other Efforts*

It is clear that certain trends are at work in seeking to move Southern society toward granting full legal and political rights to Negroes. In the area of judicial reform, for example, there appears to be strong support in Mississippi for the abolition of the justice of the peace system, under which the justices have a pecuniary interest in the conviction of persons charged before them.[53] The Supreme Court of Mississippi is showing an increasing concern for the strict respect of basic civil liberties in criminal trials.[54]

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[50]See 28 U.S.C. § 1443 (1952).

[51]See generally Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793 (1965).

[52]See Honnold, *supra* note 25.

[53]See MISS. CODE ANN. § 3940 (1956, Supp. 1964).

[54]See, *e.g.*, Echoles v. State, 180 So. 2d 630 (Miss. 1965); Guyot v. State, 252 Miss. 509, 175 So. 2d 184 (1965); Harper v. State, 251 Miss. 699, 171 So. 2d 129 (1965).

The Mississippi Economic Council has called for compliance with the Civil Rights Act of 1964 and for the fair and impartial administration of the voting laws.[55] A group of responsible citizens in McComb issued a statement urging order and respect for law as well as equal treatment of Negro citizens with respect to juries and voting.[56] The Mississippi Manufacturers' Association has urged "all employers in the State to become familiar with its [title VII of the Civil Rights Act of 1964] provisions" with a view to its implementation.[57]

The Law School of the University of Mississippi has taken significant steps in promoting vigorous academic exploration of constitutional and professional problems arising from the denial of justice to under-privileged citizens. Chief Justice Ethridge of the Supreme Court of Mississippi conducts a seminar on the ethics and responsibilities of the legal profession, in which two attorneys of the Lawyers' Committee have participated. Numerous law professors from all areas of the country have taught on a rotating basis at the Law School within the past year. As evidenced by the invitation of Senator Robert F. Kennedy to the University by the Law Students' Speakers' Bureau, and the warm reception which his remarks were accorded, the young persons of the state have demonstrated a strong intellectual curiosity and receptivity to new ideas.

Two additional legal aid programs, in addition to a limited existing program in Hinds County,[58] have been established. One program provides legal aid to the indigent in certain civil cases as a component to the Community Action Program funded for Coahoma County by Coahoma Opportunities, Inc. The second consists of a National Legal Aid and Defender Project administered through the University of Mississippi and providing for public defender services in the 19th Judicial District, as well as faculty and student research and representation projects in criminal law.

The preceding list is of course only a partial summary of attempts at solutions which are in the process of effectuation at the state and local level. There are certainly many other programs of which I have no personal knowledge. However, as my previous remarks have suggested, the efforts that have been undertaken at the state and local level to improve the administration of justice for Negroes have been of little or no import to date. The progress achieved has resulted from the enforcement of federal legislation and court orders, and from the pressures brought to bear on Mississippi by national efforts of the Bar, clergy, and civil rights organizations.

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[55]See VOTING IN MISSISSIPPI at 25.

[56]See REPORT ON LAW ENFORCEMENT at 40-41.

[57]See ADMINISTRATION OF JUSTICE at 383.

[58]See remarks of Earl T. Thomas in ADMINISTRATION OF JUSTICE at 305.

C. The Need for Expanded National Efforts

In the first section of this article it was stated that, after passage of the Voting Rights Act of 1965, there remains sufficient racist control of the law-making instruments to assure, in the absence of renewed national responses, long-term lower caste status for the Negro in his relations with public authority. This is reflected in the activities of the Mississippi Legislature at its regular session which is under way at the time of writing of this article. It is apparent that, anticipating substantal increases in the number of Negroes registered to vote, the Legislature is determined to raise obstacles to the right of Negro candidates to run for office, as indicated by the following examples.

On March 5, 1966, elections to fill vacancies for the office of school board trustee in certain school districts were scheduled to be held in various parts of the state. In Panola, Clay, Bolivar, and other counties Negro citizens were planning to present themselves as candidates. Under the established procedure nominations were to be made at a "town meeting" type election, with no requirement that a petition be submitted by any candidates prior to the time of the election. On February 22, 1966, the Governor signed into law Senate Bill No. 1880 requiring that all candidates for such vacancies file with the County Superintendent of Education, no later than ten days prior to the election, a petition of twenty-five qualified resident electors, together with an affidavit certifying to the authenticity of the signatures and of the signatories' status as qualified electors. The bill took effect immediately, with the deadline for compliance fixed for February 23, 1966. No promulgation of the bill was made nor was it publicized in any newspaper or other news media with the exception of a radio broadcast in Panola County. County Superintendents of Education had received notice of the pendency of the bill approximately one week before its passage. The new requirement placed a heavy burden on Negro candidates because of the absence of promulgation or notice, the extremely short period of time for compliance and the confusion existing as to the definition of the term "qualified elector" with respect to Negroes newly registered to vote but without any prior poll tax receipts.[59] On March 2, 1966, upon the application of Negro candidates for vacancies in Clay and Bolivar Counties who had been disqualified from running for office by the enactment of the bill, a federal district court issued a temporary restraining order enjoining its enforcement with respect to the elections of March 5, 1966.[60] The timing of the enactment suggests

[59]See Hamer v. Campbell, No. 22552, 5th Cir., March 11, 1966 (reversing the district court's failure to enjoin elections in Sunflower County and approving *nunc pro tunc* suspension of the poll tax requirements of MISS. CONST. § 241).

[60]Boyd v. Johnson, Civil Action No. DC668, N.D. Miss., order entered March 2, 1966.

that the purpose of the bill was effectively to deny to Negro candidates their right to present themselves for election.

The Committee Substitute for House Concurrent Resolution No. 36 to amend section 271 of the state constitution to provide that the legislature may provide for the consolidation of existing counties has been freely described to the press by certain legislators as a bill which might have to be invoked if Negroes should obtain a voting majority in any particular county. House Bill No. 68 increases by approximately ten-fold the number of signatures of qualified electors required on the petition to be filed in any general or special election by a candidate not having been nominated by a political party. Senate Bill No. 1553 provides that all petitions presented to any governing board of the state or subdivision must be signed personally by each petitioner. The latter bill leaves the illiterate voter, now lawfully registered under federal law, unable to take part in the nominating process.

The development of new and ingenious devices to frustrate the purpose of federal law with respect to Negro rights was pointed out by the Supreme Court as a familiar pattern:

> Two points emerge vividly from the voluminous legislative history of the [Voting Rights] Act. . . . First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccesful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[61]

The Court lists some of the devices which have been employed to prevent Negroes from voting, including literacy tests, grandfather clauses, property qualifications, "good character" tests, the white primary, improper challenges, racial gerrymandering, and discriminatory application of voting tests, noting that:

> The course of subsequent Fifteenth Amendment litigation in this court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. . . .
>
> According to the results of recent Justice Department voting suits, the latter stratagem [discriminatory application of voting tests] is now the principal method used to bar Negroes from the polls.[62]

[61] South Carolina v. Katzenbach, 34 U.S.L. WEEK 4207, 4208 (U.S. March 7, 1966).

[62] *Id.* at 4209. See also United States v. Louisiana, 380 U.S. 145 (1965), where the Supreme Court struck down the Louisiana voting laws in view of their long history of discriminatory application.

It appears that the current legislative bills portend a renewed program to restrict and frustrate the political and legal rights of Negroes, through the introduction of devices that appear to fall within the same category of discredited techniques as those listed by the Supreme Court in its opinion upholding the constitutionality of the Voting Rights Act of 1965.

However, the current efforts of the legislature may be overly vigorous, as the recent estimates of Negro registration in Mississippi indicate that only approximately 122,000 of 422,000 age-eligible Negroes are registered, or approximately 29%.[63] The figures make it clear that the process of stimulating voter registration will not be easy or swift. Although the artificial devices have been eliminated, the use of economic and physical reprisals continues without effective punishment of the perpetrators. The Commission observed prior to passage of the Voting Rights Act that:

> there is widespread fear in many Negro communities that an attempt to register or vote would result in economic or physical reprisals. . . . Fear of reprisal is a major factor inhibiting attempts by Negroes to register or vote. In counties where fear is great, Negroes will not attempt to register in significant numbers without assistance or encouragement.[64]

A clue to a broad approach to a solution is given by Charles Morgan, Jr.: "The lesson: in their failure to speak and act at every stage of crisis, the moderates—the nice, good, safe, respectable people—bear the major share of responsibility for the acts of violent men in the street."[65] Many commentators on Southern justice emphasize that extremist groups would not go unpunished if they did not enjoy the tacit approval of the dominant members of the community. William Peirce Randel states:

> The Klan's dedication to the principle of white supremacy is obvious enough, but it is hardly less obvious that the Klan did not invent white supremacy. If it invented anything, it was a method of doing illegally what the great majority of Southern whites, in the difficult days after the Civil War, desperately wanted to do but found they could not do through legal measures. The Klan could not have been the effective force it was without the overwhelming support of the Southern whites, or without the cloak of secrecy under which it could operate with little fear of detection. Some of the 'better elements' of Southern society publicly deplored the worst Klan violence, but their sense of outrage stopped short of exposing individual

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[63]The Commercial Appeal (Memphis), April 11, 1966, p. 1, col. 4 (statistics compiled by the United States Dep't of Justice).

[64]See VOTING IN MISSISSIPPI at 61.

[65]MORGAN, *op. cit. supra* note 6, at 38.

> Klansmen and prosecuting them as criminals. . . . Public opinion *could* have suppressed the Klan, but it didn't. The Klan, whether or not its methods were pleasant to contemplate, was doing what people wanted—preserving white supremacy.[66]

As Randel indicates, along with William Bradford Huie in his *Three Lives for Mississippi*,[67] the responsible leaders of the South cannot avoid responsibility for the acts of the "fringe" element. Their terrorism can of course be curbed, given the resolution of the community to that end. But attempts to curb it have failed because governmental, professional, and business circles of the South have by statute, custom, and philosophy manifested their moral commitment to the maintenance of segregation as a way of life. The ingenious structure of devices to disfranchise the Negro continued to be an integral part of Southern life until it was broken down by the Voting Rights Act. Public school desegregation in the South has been achieved only by court orders and the enforcement of title VI of the Civil Rights Act of 1964, and for the most part only in a tokenist manner. The commitment of responsible persons to preserve the caste status of the Negro is so deeply rooted that the ordinary ethic respected in other spheres of activity is overthrown if necessary to maintain the Southern system. Public officials, for instance, will testify that there is no racial discrimination in areas with respect to which the federal courts have taken judicial notice of the contrary.[68]

Moreover, the jurisprudence of nullification calls for resistance to change for as long as possible: only court orders need be obeyed, but not the law itself. As a result of this attitude an inordinate amount of litigation is required to secure minimal compliance with federal law. The Supreme Court pointed out, with respect to the actions brought against voter discrimination by the Department of Justice (of which 26 were brought in Mississippi):

> Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting age Negroes in Alabama rose only from 10.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting age whites

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[66] RANDEL, THE KU KLUX KLAN: A CENTURY OF INFAMY 18-19 (1965).

[67] HUIE, *op. cit. supra* note 6, at 37.

[68] See Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962), where the defendants testified that there was no policy of excluding Negroes from the University of Mississippi.

ran roughly 50 percentage points or more ahead of Negro registration.[69]

As Myrdal observed,[70] the importance of political participation as a solution to discrimination illegally maintained in the South should not be exaggerated: the South maintains an entirely different concept of the Negro from that of the North in regard to his relation to public authority. The resistance to the granting of any greater legal status to Negroes than the federal government requires by statute and court order persists.

There is therefore no path open other than that of further national efforts. Without renewed energetic programs of exterior pressure and coercion, the Southern liberal and the civil rights movement itself will atrophy as the focus of publicity and national attention turns to Vietnam or other crises. There should therefore be additional legislation to provide for the selection of state and local juries by federal commissioners in states or subdivisions where systematic exclusion of Negroes from juries is shown; substantive federal criminal statutes should be enacted to punish crimes of racial violence, with provisions for removal of state prosecutions to federal courts where necessary to assure equal protection of the laws; administrative machinery should be provided for the removal by federal commissioners of state and local officials who commit gross violations of federal law; and civil indemnification should be provided for the victims of racial violence.[71] Renewed consideration should be given to the development of sterner methods in the implementation of title VI of the Civil Rights Act of 1964, with emphasis on drafting regulations which will place a heavier burden upon the recipient agency to prove that it has eliminated all practices of discrimination. The private resources of the country at large, which have sent to the South outstanding clergymen, sociologists, lawyers, and businessmen should augment their efforts to apply maximum pressure in the direction of emancipating change.

Mississippians and other southerners who have hesitated to take a firm stand must recognize that white supremacy will not relinquish its dominance easily, and that the time for a decision involving personal and professional commitment toward a just society is drawing near.

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[69]South Carolina v. Katzenbach, *supra* note 60, at 4209-10.

[70]See text accompanying notes 9 & 10 *supra.*

[71]See H.R. No. 12807, 89th Cong., 2d Sess. (1966) (introduced by Representative Diggs).

STATE BAR SECTION

RULES OF THE SUPREME COURT OF MISSISSIPPI

Foreword*

All attorneys who presently have, or will have, cases on the docket of the Supreme Court of Mississippi should note the following changes by the Supreme Court in its rules, especially as they pertain to the due dates of briefs. Previously, the due dates of briefs had been fixed from a period beginning 30 days before the case was set for argument. Hereafter, the due dates of briefs will be computed from the time the record of the case is filed in the Supreme Court. For example, under Rule 7(a) appellant's brief must be filed not later than 40 days after the date the record is filed in the office of the Supreme Court Clerk. Appellee's brief must be filed not later than 60 days from the date the record is filed in the Court. Any rebuttal brief of appellant must be filed not later than 65 days after the record is filed in the Supreme Court. Each case will then be considered at issue, and is thereafter subject to being set for oral argument and submission at any time in the discretion of the Court.

Under Rule 9, all cases where oral argument is **not** requested will be **submitted** when they are reached on the docket, without call and without notice to the lawyers or litigants. In cases where oral argument is requested, Rule 9 provides that the Supreme Court Clerk will notify counsel of record at least 10 days before the date set for argument. Also under Rule 9, oral arguments will be heard on any day of the week designated by the Court, although announcements of decisions will be made on each Monday at which time the Court is sitting.

These rules become effective on the 16th of May, 1966. If a record is filed *on or after* that date, the times for filing briefs will be computed from the date of filing the record in the office of the Supreme Court Clerk.

If a record has been filed in the Court *prior to* that effective date of May 16, 1966, for the purpose of Rule 7 and the due dates of briefs, the filing date of the record in such cases shall be considered to be the date on which this rule becomes effective, May 16, 1966.

The purposes of these new rules are to expedite the administration of the Court's docket and to facilitate a full consideration of each case. Therefore, these revised rules will permit the Court to assign cases to the Judges before oral argument, so that the record and briefs may be read by the Judges before argument.

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*Prepared by Chief Justice W. N. Ethridge, Jr., Supreme Court of Mississippi, Jackson, Mississippi.

The Court requests the cooperation of the Bar in effectuating these changes, particularly with reference to changes in the due dates of briefs. The following rules set forth completely the revisions in Mississippi Supreme Court Rules 6, 7, 9, 25, and 35. Reference should be made to 36 MISS. L.J. 182 (1965), where is printed a complete listing and annotation of the rules as they existed prior to the following revisions.

RULES

It is hereby ordered and adjudged that Supreme Court Rule 6 be and it is hereby repealed, and in lieu thereof Rule 6 shall read as follows:

Rule 6. Assignments of Error

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided *infra* in Rule 7, Subsection (a). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

This rule shall take effect and be in force from and after the 16th of May 1966.

It is hereby ordered and adjudged that Supreme Court Rule 7 be and it is hereby repealed, and in lieu thereof Rule 7 shall read as follows:

Rule 7. Briefs

(a) Immediately upon receipt of the record, and for the convenience of attorneys, the Clerk shall notify counsel of the filing of the record and the due date of briefs in accordance with this rule. However, failure of the Clerk to give or of a party to receive notice of the filing of the record shall not excuse any delay in filing briefs.

Appellant's brief shall be filed not later than 40 days after the date the record is filed in the office of the Clerk of this Court.

Appellee's brief shall be filed not later than 60 days from the date the record is filed in this Court, and any rebuttal brief of appellant shall be filed not later than 65 days after the record is filed herein. An original and five copies of all briefs shall be filed with the Clerk. The certificates of appeal required in criminal cases under Mississippi Code Annotated sections 1182-1184 (1956) shall not affect the due dates of briefs in all cases, civil and criminal, which shall be as stated above.

All cases in which the record has been filed prior to the effective date of this rule shall be subject to this rule, except that the filing date of the record in such cases shall be considered to be the date on which this rule becomes effective; and the above-stated periods for filing briefs

in such cases shall begin with the effective date of this rule.

Each case shall be considered at issue after the due date for filing of briefs has expired, and is thereafter subject to being set for oral argument and submission at any time in the discretion of the Court in accordance with Rule 9.

If the appellant fails to file his brief within the time herein required, his case shall be dismissed on motion of appellee or on the Court's motion; and any case so dismissed shall not be re-instated except as provided by Rule 18. If the appellee fails to file his brief within the time herein required, such brief shall be stricken from the record on motion of appellant or on the Court's motion. For the purpose of enforcing the foregoing, the Clerk shall advise the Court of any delinquency in filing briefs.

(b) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: First, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the points discussed may be found; and, second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(c) Appellant's original and rebuttal briefs together shall not exceed fifty (50) pages, and appellee's brief shall not exceed fifty (50) pages. They shall be typewritten or printed; and if typewritten, shall be in black non-copying ink, double-spaced (exclusive of quotations and footnotes), on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof. Every brief shall be distinctly and plainly printed, or typewritten, and if typewritten, on paper not exceeding eight and one-half inches in width and not exceeding fourteen inches in length, on one side of every page; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margain at the top of not less than one and one-half inches and at the bottom of not less than one inch, a margin on the right side of not less than one-half inch, and a blank margin on the left side of not less than one and one-half inches. The type shall not be smaller than pica. Subject to other requirements of these rules, briefs may be reproduced also by offset printing, positive photocopy, or mimeograph process, or by any substantially similar method, provided the product is clear, easily readable, and without glare.

(d) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

(e) If oral argument is desired by either party, he shall give notice thereof on the cover or front page of his brief by stating thereon, "Oral Argument Requested." Such request may be withdrawn by written or oral notice to the Clerk of the Court and opposing counsel.

(f) The appealing party in all direct appeals and cross-appeals shall file a brief statement not exceeding two pages, setting forth the nature and purpose of the case, the action of the trial court thereon and the points raised on appeal. The opposing party may file a similar statement. All such statements, the original and five copies thereof, shall be filed at the time of the filing of the briefs. This brief statement shall be separate from the brief and shall not be physically attached to or included in the brief.

(g) The front cover of every brief shall show the style and number of the case and shall designate the brief as "BRIEF FOR APPELLANT," "BRIEF FOR APPELLEE," or "APPELLANT'S REBUTTAL BRIEF." Each brief shall contain a topic or subject index identifying clearly by a sentence or concise statement the separate points to be urged before the Court. The points so identified shall be numbered consecutively, and under each point shall be an alphabetical list of the cases, statutes, textbooks, and other authorities or materials which the brief maker is relying upon in support of that point, showing the page or pages of the brief where that case or other authority is mentioned. In addition to the above, there shall be a separate alphabetical table of all cases and other authorities cited in the brief with a reference to each page of the brief where the authority is mentioned. All Mississippi cases shall be cited to both the official Mississippi Reports and the Southern Reporter. Quotations from cases and authorities appearing in the text of the brief shall be followed by a reference to the book and page(s) where the quotation appears.

This rule shall take effect and be in force from and after the 16th day of May, 1966.

It is hereby ordered and adjudged that Supreme Court Rule 9 be and it is hereby repealed, and in lieu thereof Rule 9 shall read:

RULE 9. CALL AND ORDER OF DOCKET

(a) Except as may be provided by special order, all civil cases will be submitted in the order in which they stand on the docket.

(b) All cases, civil and criminal, where oral argument is not requested, will be submitted when they are reached on the docket, without the necessity of the cases being called and without notice to the lawyers or litigants. In cases where oral argument is requested, the Clerk of the Court shall notify counsel of record at least 10 days before the date set for arguments. Oral arguments will be heard on any day of the week which meets the convenience of the Court.

(c) The minutes shall be signed and announcements of decisions shall be made on each Monday when the Court sits.

This rule shall take effect and be in force from and after the 16th day of May, 1966.

It is hereby ordered and adjudged that Supreme Court Rule 25 be and it is hereby repealed, and in lieu thereof Rule 25 shall read:

RULE 25. CRIMINAL DOCKET—WHEN CALLED

Criminal cases may be set by the Chief Justice or Presiding Justice for call on any day when the Court is sitting, and in such numbers as he may designate.

This rule shall take effect and be in force from and after the 16th day of May, 1966.

It is hereby ordered and adjudged that Supreme Court Rule 35, subsection (a), be and it is hereby repealed, and in lieu thereof Rule 35, subsection (a) shall read:

RULE 35. COURT SITTINGS

(a) The Court sittings for the hearing of the arguments will be held on the First, Second, Third, and Fourth Mondays of each month, beginning with the Second Monday in September and ending with the Second Monday in June, and, in accordance with Rule 9(b), oral arguments will also be heard on any other day of the week which meets the convenience of the Court.

This rule shall take effect and be in force from and after the 16th day of May, 1966.

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STUDENT COMMENTS

EQUITABLE INTERPLEADER IN MISSISSIPPI

I. General Nature and Object

A person may be in possession of property to which he makes no claim of beneficial ownership, or may be subject to an obligation but in doubt as to whom the obligation is due. This same property or obligation may be claimed by two or more adverse parties. With this situation exists the hazard of deciding between the conflicting claims and the consequent possibility of double liability for the single debt if the decision is not correctly made. If the person who finds himself in such an unfortunate position, being in reality only an innocent stakeholder, can deposit into court the property or fund which represents the obligation, force the adverse claimants to appear and litigate their claims, receive for himself a discharge from further liability involving the subject of the dispute, and have no further liability for the costs of the litigation, then the disinterested stakeholder has been fully protected. The interpleader provides such protection.

The early common law recognized a very narrow and limited form of interpleader in cases of joint bailment and of wardship and detinue.[1] Because of the unsatisfactory scope and nature of the interpleader at common law, equity began to recognize the remedy of interpleader,[2] the true origin of the equitable bill of interpleader being that there was either no remedy at law or that the legal remedy was inadequate under the given circumstances.[3] A person who was threatened with adverse claims to property or funds which he possessed or to an obligation which he owed, and in which he had no interest, applied to the court of equity for protection. This remedy was sought not only from the threat of being compelled to pay the obligation or deliver the property to both claimants, but also from the harassment of defending the multiplicity of suits which could be instituted against him.[4] Although the protection of an interpleader against double payment is a sufficient reason for the recognition of such remedy, it is said that the true rationale of the remedy is to prevent the stakeholder from being confronted with a number of suits in respect to a single liability.[5] The party bringing the interpleader, upon the approval of the bill by the court, is discharged

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[1] 2 Story, Equity Jurisprudence 502 (14th ed. 1918) [hereinafter cited as Story].

[2] 48 C.J.S. *Interpleader* § 2 (1955).

[3] 2 Story 505-06.

[4] *Id.* at 502, 505.

[5] 4 Pomeroy, Equity Jurisprudence 904 (5th ed. 1941) [hereinafter cited as Pomeroy].

from his obligation by delivering or offering to deliver the res into court; the stakeholder is not further involved in the dispute, for the adverse claimants will then litigate the matter among themselves.[6]

To warrant the filing of a bill of interpleader, it is required that the complainant be a stakeholder; that is, he must make no claim to the subject-matter in dispute.[7] There is no necessity that there be actual litigation involving the complainant; the bill lies where conflicting claims have been made and the complainant is in certain danger of being involved in litigation, thus being forced to defend against these adverse claims.[8] It must be apparent that the claims are based on a reasonable foundation and that the complainant has a justifiable doubt to whom payment or delivery is to be made.[9]

An early Mississippi case generally outlined the nature and object of a bill of interpleader:

> A bill of interpleader is a proper remedy when suits are either threatened, or actually pending by two different claimants against a party, claiming the same debt or duty by different or separate interests. The complainant, not knowing to which of right he ought to pay or render it, files a bill and requires them to interplead, that the Court may determine the right. The principle of a bill of interpleader is to protect the party, not only from being compelled to pay, but also from the vexation attending the discussion of all the suits that may be instituted. It is not necessary in order to justify the filing of such a bill, that suit should actually have been commenced; it is sufficient that claim should have been made against the party, and that he is in danger of being molested by conflicting rights.[10]

Since an interpleader is brought to determine the rights to a particular subject-matter in dispute, it would therefore logically follow that such proceedings would be in rem, but to the extent that the litigation does not bind the right of those parties not within the jurisdiction of the court, the action is not one in rem.[11] As a result of this requirement of personal jurisdiction over each of the several claimants, a bill of interpleader will not lie unless all claimants are in existence and capable of interpleading.[12]

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[6] 48 C.J.S. *Interpleader* § 2 (1955).

[7] 2 STORY 507.

[8] 4 POMEROY 905.

[9] 2 LAWRENCE, EQUITY JURISPRUDENCE 1020 (1929) [hereinafter cited at LAWRENCE].

[10] Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291, 294 (1844).

[11] 2 LAWRENCE 1018.

[12] Browning v. Watkins, 18 Miss. (10 S. & M.) 482 (1848).

II. Persons Entitled to Interpleader

There are certain requirements which must be fulfilled in the complainant's relation with the defendants, and with the subject-matter in dispute, to entitle him to an interpleader. The complainant must have no claim in the res and must have incurred no independent liability to any of the defendants, but must stand as a mere stakeholder, consistently impartial.[13] An interpleader will not lie if the applicant has assumed multiple liability in any manner, for only one liability may be owed.[14] A stakeholder seeking a bill of interpleader must have sufficient possession of the subject-matter to facilitate a deposit into court,[15] and must also be willing to make such a deposit into court.[16] Once these foregoing requirements are met, there is a further requisite that the complainant make an affidavit that he is not in collusion with any of the claimants,[17] and the bill of complaint must show that his risk of vexation by multiple suits is real, although the actual commencement of a suit by one of the claimants is not a requirement.[18]

The legal relationship occupied by the complainant which placed him in a position making an interpleader necessary to the protection of his interests is not necessarily a bar to the granting of the bill. Complainants in interpleader actions in Mississippi have been: maker[19] or drawer[20] of a negotiable instrument; sheriffs;[21] administrator[22] and co-administrator[23] of an estate; mineral lessee;[24] purchaser at an execution sale;[25] obligor under a simple contract;[26] builder-obligor on a building contract;[27] special commissioner for an execution sale;[28] attorney for collection;[29] insurer;[30] simple trustee;[31] depositary;[32] ware-

[13] 4 Pomeroy 913.

[14] *Id.* at 904.

[15] *Id.* at 912.

[16] Griffith, Mississippi Chancery Practice 415 (2d ed. 1950) [hereinafter cited as Griffith].

[17] 4 Pomeroy 920.

[18] *Id.* at 904.

[19] Quin v. Hart, 85 Miss. 71, 37 So. 553 (1904).

[20] Warren v. Robins, 23 Miss. (1 Cushm.) 309 (1852).

[21] Kelly v. Howard, 98 Miss. 543, 54 So. 10 (1910).

[22] Lamar v. Shoemake, 238 Miss. 90, 117 So. 2d 716 (1960).

[23] Henderson v. Garrett, 35 Miss. (6 George) 554 (1858).

[24] James v. Gulf Ref. Co., 206 Miss. 781, 41 So. 2d 2 (1949).

[25] Brown v. Bacon, 27 Miss. (5 Cushm.) 589 (1854).

[26] McPherson v. Matthews, 143 Miss. 299, 108 So. 494 (1926).

[27] Hartford Acc. & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931).

[28] Canton v. Ross, 157 Miss. 788, 128 So. 560 (1930).

[29] Topp v. Pollard, 24 Miss. (2 Cushm.) 682 (1852).

[30] Irvine v. Irvine, 241 Miss. 816, 133 So. 2d 14 (1961).

[31] Whitney v. Cowan, 55 Miss. 626 (1878).

[32] Jones v. Walsh, 194 Miss. 247, 11 So. 2d 908 (1942).

houseman;[33] tenant;[34] materialman;[35] escrow agent;[36] and the state.[37]

III. Grounds of Relief

The equitable relief of interpleader requires that certain essential elements be fulfilled before a proceeding can be maintained.[38]

A. Identity of Subject-Matter

To warrant the granting of an equitable interpleader, the same thing, debt, or duty must be claimed by all parties against whom interpleader is requested.[39] If the defendants are claiming a different res, there is no controversy between them and a court will not require them to interplead. The only thing to be litigated in an interpleader action is the ownership of the thing, debt, or duty brought within the jurisdiction of the court by the bill of interpleader. Where the claim of one defendant, if valid at all, is against the other defendant personally and not the res in dispute, an interpleader will not lie.[40]

The requirement of identity of subject-matter was stated in its narrowest terms in the case of *Glyn v. Duesburg*:

> A case of interpleader then arises where the same subject, whether debt, duty, or thing, is claimed. Now, when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to the identity of matter. But, where the subject in dispute is a chose of action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they can never be identical; but where they are the same amount that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself, to determine the identity; for the amount may be the same, and the debt may be different.[41]

Today, the concept of identity has been liberalized to the extent that a bill of interpleader may be sustained even though the amounts claimed are different. The required identity of subject-matter to support an interpleader is found where one defendant claims a part of the debt,

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[33]Sunflower Compress Co. v. Staple Cotton Co-op. Ass'n, 139 Miss. 200, 103 So. 802 (1925).

[34]Snodgrass v. Butler, 54 Miss. 45 (1876).

[35]Planters Lumber Co. v. Plumbing Wholesale Co., 181 So. 140 (Miss. 1938).

[36]Williams v. General Insurors, 193 Miss. 276, 7 So. 2d 876 (1942).

[37]Moorer v. Willis, 239 Miss. 118, 121 So. 2d 127 (1960).

[38]4 Pomeroy 906.

[39]Delta Ins. & Realty Co. v. Fourth Nat'l Bank, 127 Miss. 152, 89 So. 817 (1921).

[40]Catts v. Sipsey Coal Mining Co., 212 Ala. 421, 102 So. 895 (1925).

[41]Glyn v. Duesburg, 11 Sim. 139, 148 (Ch. 1840).

duty, or thing and the other defendant or defendants claim the whole or only a part of that very same thing, debt, or duty.[42]

B. Privity of Title or Interest

"A second requisite is that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source."[43] There must be privity of estate, title, or contract between the defendants, and it is said their claims should be of the same nature or character.[44] However, the nature of the conflicting claims appears to be the determining factor, for the claims need not be the same—they may all be legal, or all be equitable, or both legal and equitable.[45]

Privity of title or interest is another method of expressing the idea of deriving title from a common source, for to permit a complainant in possession of a thing, debt, or duty to interplead under equitable rules, the adverse claims or titles of the several defendants must be derived from or dependent upon a common source.[46] There is privity sufficient for interpleading the adverse claimants if the interpleader will fully adjudicate and finally settle all interests in the subject-matter without the necessity of further litigation.[47]

C. Disinterestedness

A bill of interpleader cannot be maintained by a complainant who has an interest in the res in dispute for he must occupy the position of a mere stakeholder; that is, he must have no claim in the subject-matter of the dispute and must be entirely indifferent as between the conflicting claims of the defendants.[48] The dispute as to the ownership of the res must be between the several defendants, for there can be no contest between the complainant and any of the defendants.[49] This proposition is ably expressed in the case of *Whitney v. Cowan*:

> [T]here are many limitations upon the proceedings by interpleader. It can never be maintained where the party filing the bill himself desires to assert any interest in, or claim upon, the

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[42]Finn v. Missouri State Life Ins. Co., 222 Ala. 413, 132 So. 632 (1931); Enterprise Lumber Co. v. First Nat'l Bank, 181 Ala. 388, 61 So. 930 (1913).

[43]4 POMEROY 908.

[44]Snodgrass v. Butler, 54 Miss. 45 (1876).

[45]4 POMEROY 905.

[46]Snodgrass v. Butler, 54 Miss. 45 (1876).

[47]GRIFFITH 417.

[48]Blue v. Watson, 59 Miss. 619 (1882).

[49]Canton Exch. Bank v. Yazoo County, 144 Miss. 579, 109 So. 1 (1926); Whitney v. Cowan, 55 Miss. 626 (1878); Browning v. Watkins, 18 Miss. (10 S. & M.) 482 (1848).

> thing in controversy, and his bill must always contain a disclaimer of personal interest, and be accompanied by an affidavit of absolute neutrality.[50]

The action cannot be brought by a party against the stakeholder and a claimant, as stated by the supreme court in the following manner:

> Where there are two or more claimants of a debt or other matter, a party may resort to chancery for his protection against the conflicting claimants, and the harassment of several suits, and insist that the claimants shall litigate their demands, and submit to the decisions of the court their respective rights. But the bill of interpleader rests upon the fundamental principle that the complainant is a mere holder of a stake, which is to be contested for by the other parties, he standing wholly indifferent between them. If the complainant seeks relief in the premises against either party, or asserts a right or claim against either or both of them, it would be fatal to his bill.[51]

There are good reasons for refusing to grant the relief of interpleader to a person who, though subject to real threat of multiple vexation, has some interest in the controversy:[52]

(1) if the complainant has an interest in the subject-matter in dispute he should contest the various claims and should not be permitted to withdraw from the litigation;

(2) where a party is permitted to withdraw from the controversy there is no way to adjudicate his claim;

(3) the relief of interpleader has traditional benefits in the form of costs, attorney's fees, remission of interests, etc., which the complainant should be denied if he participates in any claim to the res.

A few instances where the court found interest or lack of interest may be helpful in understanding the principle. There is interest where a complainant is a tenant or agent of a defendant and the other defendant claims by a paramount title.[53] A mineral lessee who stands to lose his lease by reason of one or all claims against the property has interest.[54] Interest was found where it was sought to interplead all heirs of two connected estates and the complainant was an obligor to and administrator of both estates.[55] Where the complainant and a claimant are conflicting creditors of the same debt there is such interest as to deny interpleader.[56]

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[50]55 Miss. 626, 645 (1878).

[51]Hyman v. Cameron, 46 Miss. 725, 727 (1872).

[52]Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921).

[53]See Snodgrass v. Butler, 54 Miss. 45 (1876) (dictum).

[54]Humble Oil & Ref. Co. v. Rankin, 207 Miss. 402, 42 So. 2d 414 (1949).

[55]Blue v. Watson, 59 Miss. 619 (1882).

[56]Knight v. Yarborough, 15 Miss. (7 S. & M.) 179 (1846).

There was no question of an interest in the res to bar an interpleader where an increase in costs and in interest on a debt depended upon complainant's right to interplead.[57] Where the actual amount owed by the applicant was unsettled because it was dependent upon a later determination of the specie for payment, the resulting potential increase in liability was not a detrimental interest.[58] No interest was found where the complainant purchased land subject to a prior lien and sought to interplead the assignee of his note and the lien-holder.[59] There was no objection made as to interest where the complainant refused to make an actual deposit where the answer showed that the amount owed was in dispute.[60] A mineral lessee[61] or the purchaser of real estate[62] may preclude the objection of interest if they obtain conveyances from all conflicting claimants, so that no matter what the outcome of the litigation they would not be divested.

D. No Independent Liability

A complainant seeking the equitable relief of interpleader must have incurred no independent liability to any of the defendants whom he seeks to interplead.[63] There are two classes of cases in which such independent liability may be incurred:[64]

(1) the complainant may have made himself liable to one of the claimants upon some independent undertaking, by contract or by an expressed acknowledgment of that party's title, without relation to the possible liability to the other claimant or claimants;

(2) the independent liability may arise from the very nature of the transaction or relation between the parties and have no relationship to a promise to be bound nor to a collateral acknowledgment of title.

E. Absence of Other Remedy

The origin of the interpleader in equity was that there was no remedy at law, or that the existing legal remedy was inadequate under the circumstances.[65] This background is evidenced today by the requirement that to warrant the filing of a bill of interpleader, there must be a

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[57]See Topp v. Pollard, 24 Miss. (2 Cushm.) 682 (1852).

[58]See Knight v. Yarborough, 15 Miss. (7 S. & M.) 179 (1846).

[59]See Hoggatt v. Wade, 18 Miss. (10 S. & M.) 143 (1848).

[60]See Repsher v. Bostic Lumber & Mfg. Co., 113 Miss. 46, 73 So. 868 (1916).

[61]See James v. Gulf Ref. Co., 206 Miss. 781, 41 So. 2d 2 (1949).

[62]See Moorer v. Willis, 239 Miss. 118, 121 So. 2d 127 (1960).

[63]4 POMEROY 913.

[64]*Ibid.*

[65]2 STORY 505-06.

showing that the action is necessary. The complainant must show that he has no adequate remedy at law, although the bill will not be denied solely because the applicant may have another equitable remedy.[66] Where the complainant is a party to a suit pending against an heir in which all claimants are parties, the complainant may have an adequate remedy, in which instance a bill of interpleader would be denied.[67] This requisite of no legal remedy should not be involved in Mississippi since section 1508 of the Mississippi Code provides for a legal interpleader.

F. Genuine Double Vexation

A requirement which must be satisfied if interpleader is to be granted is that there must be a real and genuine threat of double vexation with respect to a single obligation due from the complainant.[68] Practical safeguards have grown up to prevent the complainant from securing the remedy of interpleader where he is not the victim of genuine double vexation.[69]

(1) A complainant may not shift the burdens of litigation to a disinterested third party by manufacturing a groundless claim to the obligation and thereby preventing legal proceedings by one who has a legitimate claim. Therefore, if only one of the several claims is genuine and the others are clearly groundless the relief of interpleader will not lie. Under these circumstances the complainant may safely pay the one bona fide claimant for there is no hazard in determining the rightful obligee.

(2) The complainant must affirmatively demonstrate that his only intent in filing the bill is to avoid being harassed or sued by multiple claimants of a single obligation. This is accomplished by filing an affidavit that the interpleader was not brought in collusion with or at the request of any claimant. If the truth of the affidavit is questioned, it must be proved at a hearing.

(3) The res must be deposited into court or held under the control of the court.

(4) The threat of double vexation must not have been the result of any fault on the part of the complainant.

(5) Equity must have the power to finally determine the controversy. Thus, the court must have jurisdiction over the person of the claimants, making it possible to enjoin the prosecution of their claims against the complainant in other litigation.

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[66] 48 C.J.S. *Interpleader* § 8 (1955).

[67] *Ibid.*

[68] Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291 (1844).

[69] Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921).

IV. Bill in Nature of a Bill of Interpleader

A true interpleader cannot be maintained by a complainant who asserts an interest in the thing, debt, or duty in dispute.[70] A bill in the nature of a bill of interpleader is distinguished from the bill of interpleader only to the extent that under the former, a complainant may claim some independent relief or right upon the payment or delivery of the res into court.[71] Although the applicant may assert some right or request some relief under a bill in the nature of a bill of interpleader, neither this bill nor the strict interpleader will lie where the complainant asserts any claim in the subject-matter.[72] Only where the stakeholder is entitled, upon delivery of the res into court, to additional relief, independent of a discharge from liability to the adverse claimants, may a bill in the nature of a bill of interpleader be maintained.[73] An example of a situation in which such relief may be granted is the enforcement of the equity of redemption where there is doubt as to who owns the mortgage.[74]

V. Pleading and Practice

A. Bill or Petition

Generally, all ordinary rules of good pleading and practice are applicable to a bill of interpleader.[75] An equity proceeding is begun by a bill of complaint. For an action of interpleader, the complaint must set forth in this bill of complaint the allegations which show that all of the requirements for the proposed interpleader are present, permitting the court to see that there is such a relationship to the subject-matter in controversy as to warrant the remedy.[76]

It is true that a bill of complaint must contain an averment of certain elements to be safe from a demurrer, but procedural defects can be waived; if there is no objection to these defects, they are waived.[77] An averment of non-interest in the res should be found in the complaint, for the bill necessarily admits that the complainant has no interest in the subject-matter; neither can the complainant set up a right in himself after bringing the interpleader.[78] A description sufficient to identify the property or the amount of the fund in dispute is required in order to support the allegation that the defendants are claiming the same

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[70] 4 Pomeroy 911.
[71] Blue v. Watson, 59 Miss. 619 (1882).
[72] Griffith 418.
[73] Blue v. Watson, 59 Miss. 619 (1882).
[74] *Ibid.*
[75] Griffith 420.
[76] Snodgrass v. Butler, 54 Miss. 45 (1876).
[77] Hoggatt v. Wade, 18 Miss. (10 S. & M.) 143 (1848).
[78] Anderson v. Wilkinson, 18 Miss. (10 S. & M.) 601 (1848).

property or fund.[79] Also, since the basis of this relief is protection from the vexation of multiple claims for a single liability, the bill must show the existence of claimants capable of maintaining suit (proper persons in esse capable of interpleading) and must show the existence of the necessary elements to have all claims to the res finally adjudicated by this proceeding,[80] although the complainant need not set out all of the details of the origin of these claims.[81] Finally, the complainant must aver that he is not willing to determine which claimant is the rightful one and is not able to make this determination without the risk of double payment.[82]

After the complainant has made the averments showing the need for interpleader, there should be an offer to deposit the res into court.[83] The failure to make this offer may[84] or may not[85] be grounds for a demurrer. Even if the demurrer is denied, the court may decline to permit further proceedings until a deposit is made.[86]

The bill of complaint should finally request that the court order a deposit of the res into court. Upon a deposit of the res into court, the bill should ask for an issuance of process for the defendants so that they may litigate their claims, and should ask that the applicant be discharged from further liability with a recovery of his costs.[87]

If the bill of interpleader is sufficient and there is a deposit of the thing, debt, or duty into court, the complainant may then be discharged from further liability, with an injunction being issued against the prosecution of related actions against him and an award made to him of his costs.[88] Thereafter, issues are made up between the claimants and the suit is a normal proceeding in equity.[89]

B. Affidavit Denying Collusion

To prevent the use of a bill of interpleader for the purpose of giving an advantage to one claimant over the other, when the bill is filed there must be an accompanying affidavit by the complainant that there is no collusion between him and any of the defendants, and that the bill was filed of the applicant's own accord to obtain the relief sought.[90] If the

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[79] 4 POMEROY 906-08.
[80] Browning v. Watkins, 18 Miss. (10 S. & M.) 482 (1848).
[81] GRIFFITH 418.
[82] Snodgrass v. Butler, 54 Miss. 45 (1876).
[83] Blue v. Watson, 59 Miss. 619 (1882).
[84] Snodgrass v. Butler, 54 Miss. 45 (1876).
[85] Blue v. Watson, 59 Miss. 619 (1882).
[86] *Ibid.*
[87] GRIFFITH 418-19.
[88] 4 POMEROY 903.
[89] GRIFFITH 419.
[90] Blue v. Watson, 59 Miss. 619 (1882).

complainant fails to file the affidavit stating that there is no collusion, any of the defendants can demur to the interpleader.[91]

C. Payment into Court

If it appears that a bill of interpleader will not lie, the bill will be dismissed without prejudice; but if the bill is in good form and properly filed, upon the deposit of the res into court, a decree should be entered dismissing the complainant with his costs.[92] Where there is no deposit into court or an offer of deposit, the bill is not subject to demurrer for this failure, but it is within the discretion of the court, and perhaps its duty, to refuse to permit further proceedings until a deposit is made.[93] Should one of the interpleaded defendants make a demand greater than the amount deposited into court, the complainant will not be dismissed as a disinterested stakeholder, but will be subject to continued liability in excess of that admitted to be due.[94]

One of the effects of filing the bill and making a deposit into court is to admit the liability to each of the defendants, and if one of them withdraws all claim to the deposited subject-matter, a decree in favor of the remaining defendant is a matter of course.[95] Another effect of the deposit of the res is that the complainant is not liable for interest after such payment into court.[96]

D. Costs

When a complainant has, in good faith, filed a proper interpleader, he will usually be entitled to recover his costs from the subject-matter in controversy. This cost is then assessed to the unsuccessful party defendant.[97] Although it is generally said that a judgment in an interpleader action is a "judgment in rem," an adjudication of the rights of the defendants is a personal judgment in regard to matters of costs, which may be awarded in the discretion of the court.[98]

The complainant's application for costs should be made before the decree discharging him is given, for after such decree has been entered, the court has no power to make any allowance to him for costs.[99] A

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[91]Browning v. Watkins, 18 Miss. (10 S. & M.) 482 (1848).

[92]48 C.J.S. *Interpleader* § 26 (1955).

[93]Blue v. Watson, 59 Miss. 619 (1882). *But see* Snodgrass v. Butler, 54 Miss. 45 (1876).

[94]Williams v. Pennsylvania Mut. Life Ins. Co., 160 Miss. 408, 133 So. 649 (1931).

[95]Knight v. Yarborough, 15 Miss. (7 S. & M.) 179 (1846).

[96]Gayden v. Kirk, 208 Miss. 283, 44 So. 2d 410 (1950).

[97]4 POMEROY 921.

[98]Gayden v. Kirk, 208 Miss. 283, 44 So. 2d 410 (1950).

[99]48 C.J.S. *Interpleader* § 50 (1955).

reasonable attorney's fee will not be disallowed as a part of the costs of an interpleader action, if otherwise provided for by contract.[100]

There are certain situations where the complainant may be liable for costs, as where he acted in bad faith, where the bill was dismissed because it was improperly filed, or where the applicant was in collusion with one of the defendants.[101]

E. Interest on Disputed Funds

The complainant ceases to be liable for interest from the date he deposits the res into court.[102] If the subject-matter is a chattel, he is relieved from subsequent damages for its detention.[103] However, the complainant may incur liability for damages where the bill is improper due to his own laches.[104] Where the original bill was not one of interpleader, with a later attempt to make it one, the question of its propriety is open until determination by the court, and interest on the res does not stop upon the filing of the bill.[105]

F. Affirmative Relief

It is usually improper to grant a personal judgment against a complainant in addition to the requirement that he deliver the subject-matter of the controversy into court. As a general rule the only relief a defendant can have against the applicant in an interpleader action is to have the bill dismissed.[106] However, under certain circumstances the defendants may have affirmative relief against the complainant. A defendant who is brought into court by a bill of interpleader can make a claim by cross-bill for an amount which is greater than that amount which is admitted to be due, and if the claim flows out of the same contract or transaction, the complainant is subject to a contest for the additional claim, making it impossible for the applicant to be dismissed as a disinterested stakeholder.[107]

G. Limitations and Laches

Where suit is actually pending or even threatened by two or more parties who are claiming the same thing, debt, or duty by different or

[100]Hartford Acc. & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 497 (1931).

[101]48 C.J.S. *Interpleader* § 50 (1955).

[102]Gayden v. Kirk, 208 Miss. 283, 44 So. 2d 410 (1950); Anderson v. Wilkinson, 18 Miss. (10 S. & M.) 601 (1848).

[103]Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921).

[104]See Montgomery v. Evans, 2 Miss. Dec. 348 (1883).

[105]Topp v. Pollard, 24 Miss. (2 Cushm.) 682 (1852).

[106]48 C.J.S. *Interpleader* § 45 (1955).

[107]Humble Oil & Ref. Co. v. Rankin, 207 Miss. 402, 42 So. 2d 414 (1949).

separate interests, a bill of interpleader is the proper remedy.[108] Bills of interpleader have been brought at various stages of vexation: after commencement of an action at law by one claimant;[109] after one claimant had begun execution on the property;[110] after garnishment by one claimant and the initiation of the enforcement of a lien by another;[111] and, after commencement of an action at law by one claimant and the initiation of lien-enforcement by another.[112]

One seeking the relief of a court of equity to compel the claimants to interplead must request such relief before a final judgment at law, for after a judgment at law the right has been finally determined and equity cannot sustain the bill.[113]

An interpleader is a remedy offered to protect the applicant from defending two or more actions involving the same liability, but this remedy is denied one who, with full knowledge of all the facts, neglects to take advantage of this relief.[114]

H. Injunction Against Other Suits

Upon the filing of a proper bill of interpleader, an injunction will usually be issued prohibiting the prosecution of another suit against the complainant involving the same subject-matter, whether that suit be threatened or pending either at law or in equity.[115] However, an injunction cannot be granted if there has been no payment or delivery of the res into court;[116] nor can an injunction be granted after one of the defendants has obtained a judgment against the complainant concerning the same subject-matter.[117]

I. Parties

The complainant is a necessary party to a bill of interpleader until the thing, debt, or duty is deposited into court. Thereafter, the litigation is between the defendants, and all parties claiming an interest in the disputed subject-matter are necessary parties.[118] Although all parties claiming the res are necessary parties, a defendant to an interpleader action has no objection when a third party is not made a party to the

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[108]Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291 (1844).

[109]See Whitney v. Cowan, 55 Miss. 626 (1878).

[110]See Brown v. Bacon, 27 Miss. (5 Cushm.) 589 (1854).

[111]See Quin v. Hart, 85 Miss. 71, 37 So. 553 (1904) (relief denied on other grounds).

[112]See Hoggatt v. Wade, 18 Miss. (10 S. & M.) 143 (1848).

[113]Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291 (1844).

[114]McKinney v. Kuhn, 59 Miss. 186 (1881).

[115]48 C.J.S. *Interpleader* § 27 (1955).

[116]Quin v. Hart, 85 Miss. 71, 37 So. 553 (1904).

[117]Yarborough v. Thompson, 11 Miss. (3 S. & M.) 291 (1844).

[118]48 C.J.S. *Interpleader* § 24 (1955).

litigation if the want of that party will not affect the defendant's rights.[119] An interpleader is subject to a misjoinder if a party claiming an interest in the fund is a party complainant.[120]

VI. Summary

The relief of equitable interpleader is a convenient and economical procedure for a complainant who is fortunate enough to meet all of the rigid requirements which must be fulfilled to permit the action. It would perhaps be wise to remove some of these rigid requisites wherever it is possible to do so and still protect the rights of those parties making a claim to the res in dispute. Apparently the legislature attempted to make this modification by statute, permitting interpleader at law,[121] but this appears to make it possible to give the stakeholder a choice of courts only, for the interpleader so provided is merely a substitute for the equitable interpleader and is governed by the same rules.[122]

A. Vincent Blackwell

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[119]Gibson v. Goldthwaite, 7 Ala. 281, 52 Am. Dec. 592 (1845).

[120]Marcus v. People's Sav. Bank, 227 Ala. 576, 151 So. 467 (1933).

[121]Miss. Code Ann. § 1508 (1956).

[122]McAlister Bros. v. Sanders, 107 Miss. 283, 65 So. 249 (1914).

RECENT DECISIONS

Bankruptcy—Extension of Summary Jurisdiction of Bankruptcy Court

The petitioning claimant filed a claim against the bankrupt estate in bankruptcy proceedings in the District of Colorado. The trustee in bankruptcy objected to the allowance of the claim, contending that the claimant had received certain voidable preferences from the bankrupt, and demanded that such preferences be surrendered. The claim of the creditor did not arise out of the same transaction as the alleged preferences, and the claimant objected to the summary jurisdiction of the bankruptcy court. The district court of Colorado upheld the summary jurisdiction of the bankruptcy court over the matter and was affirmed on appeal by the Court of Appeals of the Tenth Circuit.[1] Held: Affirmed. A bankruptcy court has summary jurisdiction to adjudicate a trustee's counterclaim for the recovery of a preference and to decree affirmative relief. *Katchen v. Landy,* 86 Sup. Ct. 467 (1966).

Congress, in enacting the Bankruptcy Act, intended that the administration of bankrupt estates be prompt and inexpensive.[2] To effect this end, the act conferred jurisdictional powers upon the bankruptcy courts which allowed them to proceed summarily in matters pertaining to the bankrupt estate.[3] This summary jurisdiction, which precludes the right of trial by jury, comprehends controversies involving property of which the bankruptcy trustee has actual or constructive possession.[4] However, the summary power of the court does not extend over property which is held by another party under a substantial adverse claim.[5] To recover such property, the trustee must institute a plenary suit unless the adverse claimant consents to the summary jurisdiction of the court.[6] Consent of the adverse claimant may be express, or it may be implied by an act which indicates a willingness to submit to the jurisdiction of the bankruptcy court.[7] The question of consent to jurisdiction has arisen many times in cases where a claim is filed by a creditor who has received a preference. This gives rise to an objection under section 57(g) of the Bankruptcy Act to the allowance of the claim by the trustee who counterclaims for the difference between the value of the preference and the creditor's claim. Ordinarily, the bankruptcy court would not have jurisdiction to entertain a suit on the issue of the counterclaim, but consent to the jurisdiction of the court may be implied by the creditor's filing of the claim.[8] Those decisions implying consent are

[1]Katchen v. Landy, 336 F.2d 535 (10th Cir. 1964).

[2]H.R. Rep. No. 1409, 75th Cong., 1st Sess. 2 (1937).

[3]Bankruptcy Act § 2(a), 52 Stat. 842 (1938), 11 U.S.C. § 11(a) (1964).

[4]*E.g.*, Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

[5] Bankruptcy Act § 60, 52 Stat. 869 (1938), 11 U.S.C. § 96 (1964). See generally Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 434 (1924).

[6]Bankruptcy Act § 23(b), 52 Stat. 854 (1938), 11 U.S.C. § 46(b) (1964). See generally Harris v. Avery Brundage Co., 305 U.S. 160 (1938).

[7]See Page v. Arkansas Natural Gas Corp., 286 U.S. 269 (1932). See generally 2 Collier, Bankruptcy 534 (14th ed. 1964).

[8]*E.g.*, *In re* Nathan, 98 F. Supp. 686 (S.D. Cal. 1951).

largely an extension of the doctrine established in *Alexander v. Hillman*[9] that courts of equity are empowered to decide all matters in dispute and to decree complete relief where the parties involved voluntarily invoke the equitable jurisdiction of the court. Although the *Hillman* case involved an equity receivership, it was quickly extended to bankruptcy proceedings in the case of *Florance v. Kresge*.[10] This extension was apparently based on the premise that courts of bankruptcy, though created by statute, exercise equitable powers.[11] In addition to the consent doctrine, the Federal Rules of Civil Procedure, which are applicable to bankruptcy,[12] are brought into consideration to support the jurisdiction of the court.[13] Under rule 13, counterclaims are divided into two categories: (1) compulsory counterclaims which arise out of the same transaction as the claim; and (2) permissive counterclaims which arise from a separate and distinct transaction from the creditor's claim. Compulsory counterclaims may be asserted by the trustee as a matter of right, but permissive counterclaims must be based on independent jurisdictional grounds.[14]

It is well established that filing a proof of claim is consent to the summary adjudication of a counterclaim by the trustee on a preference if the preference arose out of the same transaction as the claim of the creditor.[15] However, there is a diversity of opinion as to whether jurisdiction extends to permissive counterclaims on preferences arising out of different transactions. In the leading case of *Inter-State Nat'l Bank v. Luther*,[16] the trustee's counterclaim for a preference arising out of a different transaction from that of the creditor's claim was held to be within the jurisdiction of the bankruptcy court. Relying on the *Hillman* doctrine in conjunction with rule 13, the court said that since the creditor had "impliedly consented to the jurisdiction of the court, the counterclaim was maintainable under Rule 13(b). . . ."[17] In the *Luther* case, the bankruptcy court was allowed to render an affirmative judgment against the creditor through summary proceedings. However, other circuits have not been as liberal in their extension of the bankruptcy jurisdiction.[18] The Third Circuit in *In re Solar Mfg. Corp.*[19] indicated

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[9]296 U.S. 222 (1935).

[10]93 F.2d 784 (4th Cir. 1938).

[11]See *id.* at 786.

[12]General Orders in Bankruptcy No. 37, 11 U.S.C. § 53 (1964).

[13]*E.g.*, Inter-State Nat'l Bank v. Luther, 221 F.2d 382, 390 (10th Cir. 1955).

[14]*E.g.*, Utah Radio Prods. Co. v. Boudette, 78 F.2d 793 (1st Cir. 1935). See generally 3 MOORE, FEDERAL PRACTICE 53-57 (2d ed. 1964).

[15]Peters v. Lines, 275 F.2d 919 (9th Cir. 1960); Continental Cas. Co. v. White, 269 F.2d 213 (4th Cir. 1959); In the Matter of Majestic Radio & Television Corp., 227 F.2d 152 (7th Cir. 1955); Inter-State Nat'l Bank v. Luther, 221 F.2d 382 (10th Cir. 1955); *In re* Solar Mfg. Corp., 200 F.2d 327 (3d Cir. 1952).

[16]221 F.2d 382 (10th Cir. 1955).

[17]*Id.* at 390.

[18]Peters v. Lines, 275 F.2d 919 (9th Cir. 1960); Continental Cas. Co. v. White, 269 F.2d 213 (4th Cir. 1959); In the Matter of Majestic Radio & Television Corp., 227 F.2d 152 (7th Cir. 1955); *In re* Solar Mfg. Corp., 200 F.2d 327 (3d Cir. 1952).

[19]200 F.2d 327 (3d Cir. 1952).

that it would not extend the jurisdiction of the court to permissive counterclaims. Apparently, the procedure in the Second Circuit is to disallow the creditor's claim through application of section 57(g), but the trustee must bring a plenary suit to recover the property.[20] The findings of the bankruptcy court are then res judicata upon the plenary court, and the suit, with nothing further to be decided, is but a mere formality.[21] The Fifth Circuit in a recent case[22] declined to extend the jurisdiction to permissive counterclaims, but, in denying a petition for a rehearing,[23] the court indicated that it would follow the majority of the other circuits in extending summary jurisdiction to compulsory counterclaims. Thus, it appears that, prior to the instant case, the majority of the courts of appeal were not ready to say that the filing of a claim by a creditor exposed him to a trustee's counterclaim which was not compulsory in nature. The reluctance to extend the bankruptcy jurisdiction seemed to result from a wariness of depriving a creditor of the right to trial by jury.[24]

The Court states that the decision in the instant case is not based on the consent doctrine because the proceedings in question are not a "suit" within the meaning of section 23(b) of the Bankruptcy Act which grants jurisdiction to the bankruptcy court upon the consent of the adverse party.[25] Instead, the decision is based upon the idea that he who invokes the aid of the court must submit to the adjudication of all matters in dispute.[26] Conceding the desirability of the result in light of economy of litigation, it is submitted that this reason given for the decision is so inclusive as to support the unwarranted extension of summary jurisdiction to counterclaims of all types. Conceivably, jurisdiction of the bankruptcy court could be extended to a trustee's counterclaim arising out of fraud, tort, or any other matter, since the creditor, by filing his claim, is in the language of the court submitting all matters in dispute to adjudication by the attorney referee. In addition to the possibility that the reasoning in the instant case may serve as a basis for an unwarranted extension of the bankruptcy court's jurisdictional powers, the Court disregarded the result which apparently should have been reached by syllogistically combining the results of two prior cases. The Court recognized in *Schoenthal v. Irving Trust Co.*[27] that the trustee's claim for a voidable preference was legal in nature, and in *Dairy Queen, Inc. v. Wood*,[28] the Court stated that "where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.'"[29] It is sub-

[20]See Schwartz v. Levine & Malin, Inc., 111 F.2d 81 (2d Cir. 1940).

[21]*Ibid.*

[22]Gill v. Phillips, 337 F.2d 258 (5th Cir. 1964).

[23]Gill v. Phillips, 340 F.2d 318 (5th Cir. 1965).

[24]See Gill v. Phillips, 337 F.2d 258 (5th Cir. 1964).

[25]Katchen v. Landy, 86 Sup. Ct. 467, 474 n.9 (1966).

[26]*Ibid.*

[27]287 U.S. 92 (1932).

[28]369 U.S. 469 (1962).

[29]*Id.* at 472-73.

mitted that the need for expeditious administration of bankrupt estates is not such an "imperative circumstance" that the fundamental right to trial by jury should be circumvented.

David R. Hunt

BANKRUPTCY—FEDERAL TAX LIENS—UNRECORDED LIEN AT TIME OF BANKRUPTCY INVALID AGAINST TRUSTEE IN BANKRUPTCY

A district director of Internal Revenue, on June 3, 1960, assessed over $14,000 in withholding taxes and interest thereon against the Kurtz Roofing Company. Demand for payment was made, but Kurtz refused to pay. However, the district director failed to file notice of the lien in the place prescribed by law.[1] On June 20, 1960, Kurtz filed a petition in bankruptcy. In the ensuing proceedings, Speers, the trustee in bankruptcy, contended that section 70(c) of the Bankruptcy Act and section 6323 of the Internal Revenue Code entitled him, as a "judgment creditor," to prevail over an unrecorded federal tax lien. The government countered with the proposition that a trustee in bankruptcy is not a "judgment creditor" within the meaning of the statutes. The trial court found for the trustee in bankruptcy, and the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court took the case on a writ of certiorari to resolve a conflict among the circuits. HELD: Affirmed. A federal tax lien, unrecorded at the time of filing of the petition in bankruptcy, is invalid against the trustee in bankruptcy. *United States v. Speers*, 86 Sup. Ct. 411 (1965).

If any person liable to pay a tax neglects to pay the tax, or refuses to pay such after demand has been made, the amount due is a lien in favor of the United States upon all property of the person liable.[2] This tax lien attaches at the time the tax is assessed.[3] Section 6323 provides that this tax lien shall not be valid against mortgagees, pledgees, purchasers, and judgment creditors, unless duly recorded. Section 70(c) of the Bankruptcy Act states that the trustee shall be deemed vested as of the date of bankruptcy "with all the rights, remedies, and powers of a creditor then holding a lien thereon, whether or not such a creditor actually exists."[4] An examination of the predecessors of the aforementioned code provisions illuminates to some degree the interpretation of these sections by the courts. The corresponding statutes preceding section 6323 were the same in all major respects.[5] In the predecessors of section 70(c), however, the term "judgment creditor" was used from 1910[6] until 1950.[7] The statute read: "The trustee shall be deemed vested as of the date of bankruptcy with all rights, remedies, and powers of a *judgment creditor* then holding an execution duly returned unsatisfied

[1] INT. REV. CODE OF 1954, § 6323.

[2] INT. REV. CODE OF 1954, § 6321.

[3] INT. REV. CODE OF 1954, § 6322.

[4] Bankruptcy Act § 70(c), 64 Stat. 24 (1950), 11 U.S.C. § 110(c) (1964).

[5] Int. Rev. Code of 1939, ch. 2, § 3670, 53 Stat. 448.

[6] Act of June 25, 1910, ch. 412, § 8, 36 Stat. 838.

[7] Act of March 18, 1950, ch. 70, § 2, 64 Stat. 24.

whether or not such a creditor actually exists."[8] In the 1950[9] and 1952[10] amendments, Congress dropped the specific mention of judgment creditors. The courts, meanwhile, have developed doctrines which give the federal government a great advantage in obtaining a share of the assets of the bankrupt's estate. In cases where the state governments have tried to establish themselves as statutory judgment creditors in order to come in ahead of the federal government's unrecorded tax lien, the courts have ruled that assessments for state taxes are not judgments within the meaning of section 6323.[11] Further, many courts have held that neither a mechanic's lien[12] nor a landlord's lien[13] not reduced to judgment before the federal tax lien arises, takes priority over a federal tax lien. These courts have reasoned that neither of these lien holders could be classified as a judgment creditor. Such decisions are based on the idea that even if a non-tax lien is filed prior to the time the federal tax lien arises, such a lien will constitute only an unperfected, inchoate lien.[14] In cases where personal property is involved, the courts have ruled that even though judgment is rendered before a federal tax lien is recorded, the federal lien will prevail, since the competitor for the property is required to reduce the property to possession before the lien is considered to be perfected.[15]

The question for determination in the instant case was whether the trustee as a "creditor" under section 70(c) is a "judgment creditor" under section 6323, against whom an unrecorded federal tax lien is invalid. To reach a decision, two discordant strains had to be reconciled: the desire of the courts to preserve the favored position of federal tax liens; and the debatable intent of the legislature to give trustees a position superior to that of the government in bankruptcy proceedings. Since 1950, the majority of the courts have ruled that the trustee does not assume the status of a judgment creditor as to federal tax liens,[16] although there are a few decisions to the contrary.[17] Some decisions favoring the government were based on grounds other than that the trustee is not "a judgment creditor" as to federal tax liens. *United States v. Sands*,[18] decided before the 1950 amendment to section 70(c), held that the government should take priority over the trustee, since the trustee had not reduced the property to possession. Cases decided as late as 1956 relied upon this approach to find for the government.[19] The

[8]Act of June 22, 1938, ch. 575, § 70(c), 52 Stat. 881. (Emphasis added.)

[9]Act of March 18, 1950, ch. 70, § 2, 64 Stat. 24.

[10]Act of July 7, 1952, ch. 579, § 23, 66 Stat. 420.

[11]See, *e.g.*, United States v. Zuetell, 138 F. Supp. 857 (S.D. Cal. 1956).

[12]See, *e.g.*, United States v. Eisinger Mill & Lumber Co., 98 A.2d 81 (Md. App. 1953); River Rouge Sav. Bank v. S & M Bldg. Co., 359 Mich. 189, 101 N.W.2d 260 (1960).

[13]See, *e.g.*, United States v. Leventhal, 316 F.2d 341 (D.C. Cir. 1963); United States v. Lawler, 201 Va. 686, 112 S.E.2d 921 (1960).

[14]United States v. Lawler, 201 Va. 686, 691, 112 S.E.2d 921, 926 (1960).

[15]See Fore v. United States, 339 F.2d 70 (5th Cir. 1964).

[16]See, *e.g.*, *In re* Fidelity Tube Corp., 278 F.2d 776 (3d Cir. 1960).

[17]*E.g.*, McKay v. Trusco Fin. Co., 198 F.2d 431 (5th Cir. 1952).

[18]174 F.2d 384 (2d Cir. 1949).

[19]See, *e.g.*, Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956).

basis for most decisions after 1953, however, has been the case of *United States v. Gilbert*,[20] in which the Court stated that Congress, in section 6323, used the term "judgment creditor" in the usual, conventional sense of a judgment of a court of record. It should be noted, however, that this case was concerned with whether a state, due taxes from the assets of a bankrupt, is a "judgment creditor" within the meaning of the statute rather than whether a trustee in bankruptcy was a "judgment creditor." Some courts, when deciding cases involving trustees in bankruptcy, hesitated to follow the *Gilbert* decision because it involved a state's status as a judgment creditor.[21] These courts are not alone in voicing displeasure concerning the application of the *Gilbert* rule to trustees in bankruptcy. Congress, too, has been displeased with such an application, and since 1954 several attempts have been made to change the judicial decisions by statute.[22]

Since several amendments to section 70(c) have been offered, specifically providing that the trustee should come in ahead of the government's unrecorded claim against the bankrupt's estate, it is reasonable to assume that the courts have misconstrued the intent of the legislature in enacting section 70(c) in its present form. Perhaps the omission of the term "judgment creditor" was intended to broaden, not to narrow, the scope of the Bankruptcy Act. Many authorities have urged that the courts modify their decisions to reflect more accurately the congressional purpose.[23] Further, many writers have rebutted the argument that a policy such as the courts followed was needed to protect federal revenue by pointing out that the amounts involved in such situations are limited, and in most situations the creditors of the bankrupt end up paying the federal tax claim.[24] It has been suggested that the loss in revenue would be more than offset by the reassuring effect of there being no unrecorded tax liens attached to property. This will enable faltering businesses to obtain credit more easily.[25] When all factors are brought into consideration, it appears that the decision reached by the Court in the instant case is the "correct" one, both in terms of interpreting the intent of Congress and in terms of analyzing the needs of the community.

Frank T. Moore, Jr.

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[20]345 U.S. 361 (1953).

[21]See, *e.g.*, *In re* Green, 124 F. Supp. 481 (N.D. Ala. 1954).

[22]United States v. Speers, 86 Sup. Ct. 411, 416 nn. 16 & 17 (1965).

[23]See *In re* Fidelity Tube Corp., 278 F.2d 776, 782 (3d Cir. 1960) (dissenting opinion).

[24]Loiseaux, *Federal Tax Lien in Bankruptcy*, 15 VAND. L. REV. 137, 148-49 (1961).

[25]53 GEO. L.J. 813 (1965).

CONFLICT OF LAWS—CONDITIONAL SALES CONTRACT—LEX LOCI CONTRACTUS TO GOVERN

A Michigan corporation sold two commercial trailers to a Missouri purchaser under a conditional sales contract executed in Tennessee, with delivery also being made there. The trailers were taken, with the consent of the vendor, to Missouri, where they were to be used in the purchaser's business of commercial hauling. While transitorily in Mississippi the trailers were attached by a Mississippi creditor of the purchaser. Missouri, the domicile and principal place of business of the purchaser, requires recording of conditional sales contracts,[1] but Tennessee does not.[2] The contract had not been recorded in Mississippi, Missouri, or Tennessee. The trial court held that Missouri law, the law of the situs, was controlling and that failure to record in Missouri rendered the contract void as to an attaching creditor of the purchaser in Mississippi. HELD: Reversed and judgment rendered for appellant. The law regulating conditional sales of personal property is the *lex loci contractus*. *Clark Equip. Co. v. Poultry Packers, Inc.*, 181 So. 2d 908 (Miss. 1966).

American courts have resorted to at least five different bases for the choice of law to determine the validity of a contract.[3] Generally, matters bearing upon the execution, interpretation, and validity of the contract are determined by the law of the place where the contract is made,[4] or more precisely, the place in which the final act was done which made the promise binding.[5] The chief criticisms are that the doctrine is inflexible and the outcome of the litigation could well be fortuitous.[6] A second view is that if the place of performance is different from the place of making, the law of the place of performance will govern.[7] The courts have used the phrase *lex loci contractus* "in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance."[8] Thus, where a contract for the sale of tungsten powder was executed in New York, but the place of performance was in Pennsylvania, the court applied Pennsylvania law.[9] The third theory is that the law intended by the contracting parties, either expressed in the contract or presumed by the courts, should govern the contract's validity.[10] Some courts have held, however, that where express reference is made to a particular state's

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[1]MO. ANN. STAT. § 400.9-101 (1965).

[2]Subsequent to the present litigation, Tennessee adopted the Uniform Commercial Code which requires recording of conditional sales contracts. TENN. CODE ANN. §§ 47-1-108, 47-9-102 (1964).

[3]STUMBERG, CONFLICT OF LAWS 226 (3d ed. 1963).

[4]Kelsall v. Riss & Co., 165 S.W.2d 329 (Mo. App. 1942).

[5]1 WILLISTON, CONTRACTS § 97 (3d ed. 1957).

[6]Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 663 (1921).

[7]J. R. Watkins Co. v. Hill, 214 Ala. 507, 108 So. 244 (1926).

[8]Pritchard v. Norton, 106 U.S. 124, 136 (1882).

[9]York Metal & Alloys Co. v. Cyclops Steel Co., 280 Pa. 585, 124 Atl. 752 (1924).

[10]Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).

laws, such laws must have "a real, and not a mere fictitious connection with the subject matter of the transaction."[11] This theory has been criticized as unsound because of the facility it affords for judicial manipulation.[12] A fourth theory applies either the law of the place of making or the law of the place of performance, depending on which will uphold the contract.[13] Application of this theory has been limited almost entirely to cases involving usury.[14] A theory of comparatively recent origin, called the "center of gravity" or the "grouping of contacts" theory, puts emphasis upon the law of the place which has the most significant contacts with the matter in dispute.[15] A leading case in point dealt with a cognovit note given by an Indiana debtor to an Illinois creditor; the note was valid in Illinois but invalid in Indiana. The Indiana contact points were the residence of the debtors, the signing of the note, and the placing of it in the mails there. Conversely, the business was transacted almost exclusively in Illinois, and the note was payable there. It was on an Illinois form and was prepared in Illinois. In determining Illinois law to be applicable, the "grouping of contacts" theory was expressed as follows: "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction, the law of that state with which the facts are in most intimate contact."[16]

In determining the law that will govern the construction, operation, and effect of conditional sales contracts, the courts have generally applied the law of the state where the contract was made.[17] When a conditional sales contract is made in a state where the property is then situated, but it is contemplated that the contract is to be performed or will have its beneficial operation in another state, the laws of the latter state, and not those of the state where the property was originally situated, govern the validity, construction, and effect of the contract.[18] Consequently, it has been held that where the parties to a conditional sales contract contemplate that the property is to go "into another state, and there remain quasi permanently, the law of the situs thus given to the property will control the application of a recording statute."[19] The Uniform Commercial Code[20] enables parties to choose their own applicable law. Thus, the intent of the parties as a choice of law factor in conditional sales will presumably become more important as the Code finds wider acceptance.[21] The Mississippi Supreme Court has said that the law of the place of making of a conditional sales contract will control its con-

[11]Crawford v. Seattle, R. & S. Ry., 86 Wash. 628, 150 Pac. 1155 (1915).

[12]STUMBERG, CONFLICT OF LAWS 236 (3d ed. 1963).

[13]Smith v. Brokaw, 174 Ark. 609, 297 S.W. 1031 (1927).

[14]*E.g.*, Bowman v. Price, 143 Tenn. 366, 226 S.W. 210 (1920).

[15]W. H. Barber Co. v. Hughes, 223 Ind. 570, 586, 63 N.E.2d 417, 423 (1945).

[16]*Ibid.*

[17]C.I.T. Corp. v. Guy, 170 Va. 16, 195 S.E. 659 (1938).

[18]G. A. Campbell Co. v. Frets, 167 Wash. 576, 9 P.2d 1082 (1932).

[19]Potter Mfg. Co. v. Arthur, 220 Fed. 843 (6th Cir. 1915).

[20]UNIFORM COMMERCIAL CODE § 1-105.

[21]The Mississippi Legislature is presently considering the enactment of the Uniform Commercial Code.

struction, operation, and effect.[22] As to contracts generally, the Mississippi court has held that the law of the place of performance will govern if the contract is to be performed elsewhere than the place of making.[23]

The principal case is authority for the proposition that a conditional sales contract will be regulated by the *lex loci contractus*. It is submitted, however, that an arbitrary statement that the *lex loci contractus* shall determine the interpretation to be given a contract will gravitate toward inequitable results in some situations. Such a mechanical rule could give governing effect to another state's law, even though the contract's execution or performance there was merely fortuitious. It appears, however, from an examination of the facts, that while the court's analysis of the problem at hand might be subject to criticism, the holding of the case is justified. While the attaching creditor had no knowledge of the existing claim of the vendor, the very nature of the chattel attached should cause one to investigate the situation more carefully, in order to determine whether there are any outstanding claims. Neither the vendor nor the attaching creditor was derelict, but upon analysis it seems that the conditional vendor is the more innocent of the two. However, to require a conditional vendor to record in every state seems unduly burdensome. This would not be the case if an attaching creditor were required to investigate more thoroughly the ownership of chattels subject to attachment. On the other hand, as the trailers were operated out of Missouri with the vendor's knowledge, there would be a strong argument in favor of the attaching creditor if it were shown that he had actually searched the Missouri records and had failed to find the conditional sales contract recorded there. It is argued that the law of any state chosen by the parties should govern the effects of their contract, provided that the contract has some real connection with the law of the state selected. In the absence of such intention, that law should be applied which will work the most equitable result under the particular facts of the case being decided. The residence of the parties, the number and significance of the "points of contact," and any presumed intention of the parties that appears relevant should be taken into consideration. While adoption of this approach will possibly detract from the certainty of the law claimed by the advocates of such mechanical rules as *lex loci contractus*, it should tend toward more substantial justice for the parties, an aspiration not to be forsaken by the courts.

Samuel H. Wilkins

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[22]Mid-Continent Fin. Corp. v. Grant, 213 Miss. 789, 58 So. 2d 1 (1952).

[23]Couret v. Conner, 118 Miss. 374, 79 So. 230 (1918).

CONSTITUTIONAL LAW—TORTS—ASSAULT BY CAUCASIAN UPON NEGRO AS JUSTIFICATION FOR PICKETING OF LAWFUL BUSINESS

Plaintiff, a Caucasian fruit market owner, allegedly beat a young Negro employee accused of stealing merchandise. Leaders of the local chapter of the National Association for the Advancement of Colored People organized a "selective buying" campaign in protest and set up a picket line at plaintiff's store. No discrimination in hiring or serving of Negroes was alleged by the defendants, who obstructed the entrance to the store, attempted to persuade prospective customers not to patronize plaintiff's business, and attempted to coerce plaintiff's employees to quit. As a result of the picketing, plaintiff's business dropped sharply, and he sued for a permanent injunction and compensatory and punitive damages, alleging violation of the common law rule against unjustified interference with a lawful business. Overruling defendant's motion to dismiss on grounds the picketing was protected as free speech under the first amendment to the United States Constitution, the trial court granted the injunction, and the jury awarded compensatory damages of $35,793.05 and punitive damages of $50,000.00. HELD: Affirmed. Picketing of a business establishment by a racial organization in retaliation for an alleged tort committed by the proprietor against a Negro employee is not justified as an expression of speech under the first amendment and is actionable. *NAACP v. Overstreet,* 221 Ga. 16, 142 S.E.2d 816 (1965).

The right of a person to conduct a lawful business without interference is well established.[1] At least as early as 1621 an English court held that a claim that the defendant intimidated the plaintiff's customers and employees with resultant loss of business stated a good cause of action.[2] This rule was generally followed in England[3] with the result that interference with a lawful business became a common law tort in American jurisdictions.[4] Not all interference with business is actionable, however; a legal remedy exists only against that interference which is unjustified and which results or is likely to result in damage to the proprietor.[5] Authorities generally hold that interference with business may be justified only if the interfering conduct is the exercise of a right which is of equal or greater importance in society than the right to operate the business interfered with.[6] Several early cases considered that interference by picketing might be justified.[7] It was not until 1940, however, that picketing was recognized as the exercise of the important right of free speech and protected to any significant degree from state restriction.[8] Most of the early picketing cases dealt with labor organization, but today state and federal legislation has limited labor picketing

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[1]2 COOLEY, TORTS § 230 (4th ed. 1932).

[2]Garrett v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (K.B. 1621).

[3]See Annot., 9 A.L.R.2d 228, 237 (1950).

[4]See, *e.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).

[5]See Annot., 9 A.L.R.2d 228, 259 (1950).

[6]*E.g.*, Mitchell v. Aldrich, 122 Vt. 19, 163 A.2d 833 (1960).

[7]Tanenhaus, *Picketing as Free Speech: Early Steps in the Growth of the New Law of Picketing*, 14 U. PITT. L. REV. 397 (1953).

[8]See Thornhill v. Alabama, 310 U.S. 88 (1940).

to fairly well defined areas.[9] The limits of racial picketing, however, have not been legislatively defined, and although the right of a racial organization to picket to express general grievances has been acknowledged by the courts,[10] when such picketing interferes with private business interests, there is doubt as to whose right is paramount.

The earliest cases dealing with racial picketing occurred before *Thornhill v. Alabama*[11] accorded picketing preferential treatment as free speech. In both *Beck Shoe Corp. v. Johnson*[12] and *Green v. Samuelson*[13] racial picketing was treated as a social problem different from labor picketing, and in both cases the courts ruled that the state policy of allowing picketing in labor situations did not extend to racial picketing. A few years later the United States Supreme Court, without commenting on either *Beck* or *Green*, equated racial picketing with labor picketing by deciding in *New Negro Alliance v. Sanitary Grocery Co.*[14] that the particular instance of picketing was covered by the Norris-LaGuardia Act and was not enjoinable. Until 1950, when the United States Supreme Court decided *Hughes v. Superior Court*,[15] several state courts[16] considered the *New Negro Alliance* decision controlling on the issue of whether racial picketing was the same as labor picketing. In *Hughes* the trial court found a number of pickets guilty of contempt for violating an injunction against picketing a store to force the owner to employ fifty per cent Negroes. The intermediate state court, citing *New Negro Alliance*, overturned the convictions on the ground that the picketing had arisen from a labor dispute and therefore was protected.[17] The California Supreme Court reversed, upholding the convictions, on the ground that the picketing was illegal because it was an attempt to induce action in violation of California's policy against hiring on the basis of race instead of on the basis of individual merit.[18] Although the state supreme court specifically declined to decide that the problem of racial picketing was social in nature rather than one involving labor disputes,[19] the references to racial discrimination[20] would seem to indicate that the court actually considered the problem as social. After reiterating that picketing by its nature is not the same as pure speech,[21] the United States Supreme Court affirmed by acknowledging that in certain situations in the field of racial picketing, as well as in the field of labor picketing,[22] when the result is interference with business, states

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[9]Samoff, *Picketing and the First Amendment: "Full Circle" and "Formal Surrender,"* 9 LAB. L.J. 889, 901 (1958).

[10]*E.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[11]310 U.S. 88 (1940).

[12]274 N.Y. Supp. 946 (Sup. Ct. 1934).

[13]168 Md. 421, 178 Atl. 109 (1935).

[14]303 U.S. 552, 559-60 (1938).

[15]339 U.S. 460 (1950).

[16]See, *e.g.*, Lifshitz v. Straughn, 27 N.Y.S.2d 193 (App. Div. 1941).

[17]Hughes v. Superior Court, 186 P.2d 756, 763 (Cal. Dist. Ct. App. 1947).

[18]Hughes v. Superior Court, 198 P.2d 885, 889 (Cal. 1948).

[19]*Id.* at 889-90.

[20]*Id.* at 889.

[21]Hughes v. Superior Court, 339 U.S. 460, 464-65 (1950).

[22]See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504 (1949).

still have the power to decide which of the conflicting interests is to be given preference. Thus, the Court recognized that the correct test should be to balance the interests of the parties involved in each instance rather than to decide by broad categorization. Although an occasional jurisdiction still considers racial picketing as basically a labor problem,[23] the majority of courts[24] follow the test approved in *Hughes* and stated in *Beck*, which is to consider "the ends to be accomplished and the means . . . adopted" by the defendants[25] and to balance the "advantages to the defendants as against the disadvantages to the plaintiff and to the social order as a whole. . . ."[26]

Although the racial picketing cases discussed dealt with demands for jobs, it is suggested that the test stated above should be applied whenever the right of picketing as free speech conflicts with the operation of a lawful business. Applying this test to the instant case, it would appear that the decision was correct. The defendants' purposes, publication of the alleged assault and retribution therefor, seem of less importance in society than the right of the plaintiff to operate his business. Furthermore, the general public has an interest in having crimes such as assault punished in an orderly manner by police authorities rather than by private action which can be disruptive to the social order. The Georgia court relied on the illegality[27] of the picketing and the fact that there was no racial discrimination in hiring or serving alleged or proved.[28] It is submitted that these factors should be considered along with others and should not be determinative by themselves, just as picketing by a racial group should not be allowed by calling it labor picketing or prohibited by refusing it that recognition. However, picketing is not an absolute right just because it has been called free speech, and when a lawful business is injured because picketing is used as private punishment for an act which should be handled by proper authorities, the picketing should be closely restricted.

Robert Charles Galloway

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[23]*E.g.*, Fair Share Organization v. Mitnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963).

[24]*E.g.*, NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *remanded as moot*, 376 U.S. 190 (1964).

[25]Beck Shoe Corp. v. Johnson, 274 N.Y. Supp. 946, 953 (Sup. Ct. 1934).

[26]*Id.* at 954.

[27]NAACP v. Overstreet, 142 S.E.2d 816, 824 (Ga. 1965).

[28]*Id.* at 823.

MILITARY LAW—RIGHT TO COUNSEL IN SPECIAL COURTS-MARTIAL

Petitioner, a Private First Class in the United States Army, was tried before a special court-martial on charges involving breaches of military orders and discipline and fraud in the issuance of worthless checks in violation of articles 86, 90, 117, 123, and 134 of the Uniform Code of Military Justice.[1] Prior to trial, petitioner requested that attorneys be assigned to represent him, but this request was denied. Two commissioned officers, neither of whom had any experience or training in law, were appointed as petitioner's defense counsel. On the advice of his appointed counsel, petitioner pleaded guilty to all of the charges against him, and was subsequently convicted and sentenced. Petitioner filed an application for habeas corpus in the United States District Court. HELD: Writ granted. The sixth amendment right to counsel applies to an accused in a special court-martial, and its requirements are not satisfied by the use of a nonlawyer. *Application of Stapley*, 246 F. Supp. 316 (C.D. Utah 1965).

Although there exists some discord among legal commentators as to whether the Founders intended the due process protection of the Bill of Rights to apply to the military,[2] it is evident that early Congresses, acting under their article I power to make "Rules for the Government and Regulation of the land and naval Forces," did not deem themselves restricted by the Bill of Rights.[3] The federal courts have, likewise, traditionally fostered the concept that a dichotomy exists between the due process requirements applicable to civilian and military legal systems, and have long held that military personnel are endowed with only those rights specifically granted them by Congress and may not assert constitutional safeguards.[4] This due process dichotomy is founded upon the belief that under article I Congress acquired the exclusive power to provide for the trial and punishment of military offenses. This power was "given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States. . . ."[5] Thus, as it was stated by the Supreme Court: "to those in the military . . . the military law is due process."[6] The Court of Military Appeals, the military counterpart of the United States Supreme Court,[7] soon after its establishment took virtually the same view, holding that constitutional due process could be limited by the Uniform Code of Military Justice since military due process was not based upon the guarantees of the Constitution, but upon the enactments of Congress.[8] Accordingly, despite the fact that the only express distinction made in the Bill of Rights between civilians and military personnel is that the latter have no right to

[1] 10 U.S.C. §§ 886, 890, 917, 923, 934 (1964).

[2] *Compare* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957), *with* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1-2), 72 HARV. L. REV. 1, 266 (1958).

[3] Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127, 128 (1964).

[4] See, *e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[5] *Id.* at 79.

[6] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

[7] See 10 U.S.C. §§ 867, 876 (1964).

[8] United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

grand jury indictment,[9] servicemen have not been given the right to such due process protections as the prohibition against excessive bail[10] or the right to trial by petit jury.[11] However, while the court-martial is not regarded as a judicial proceeding in the article III sense,[12] it does not follow that the constitutional guarantees embodied in the Bill of Rights may be completely disregarded. Recent decisions of the Court of Military Appeals have considerably tempered the traditionally rigid view of military due process and indicate a trend toward affording military personnel most, if not all, of the protections granted to civilians by the Bill of Rights.[13] In a recent statement of this view, the military court unequivocally declared that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[14] At present, the due process protections recognized by the Court of Military Appeals as being available to an accused before a court-martial include: the sixth amendment rights to a speedy[15] and public[16] trial, compulsory process,[17] and confrontation of opposing witnesses;[18] the fifth amendment privilege against self-incrimination;[19] and the fourth amendment protection against unreasonable search and seizure.[20] Moreover, a number of due process rights are expressly guaranteed in the Uniform Code of Military Justice.[21] Throughout modern legislative enactments, treatises, and court opinions, there can be seen a growing concern for the rights of the accused serviceman, and a realization that military tribunals must adhere to the basic principles of due process.[22]

In England, during the latter half of the eighteenth century, an accused in a criminal trial for felony was denied the aid of counsel.[23] While this rule was expressly rejected in the American colonies at the

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[9]U.S. CONST. amend. V.

[10]Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure*, 29 TEMP. L.Q. 1, 5 (1955).

[11]*Ex parte* Quirin, 317 U.S. 1, 39-42 (1942).

[12]*Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 250-51 (1863).

[13]See, *e.g.*, United States v. Nowling, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958). See generally Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964).

[14]United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

[15]United States v. Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

[16]United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

[17]United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

[18]United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[19]United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

[20]United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963).

[21]*E.g.*, 10 U.S.C. § 855 (1964) (prohibition of cruel and unusual punishment); 10 U.S.C. § 844 (1964) (protection against double jeopardy); 10 U.S.C. § 835 (1964) (accused is entitled to a copy of the charges on which he is to be tried).

[22]See, *e.g.*, United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); 10 U.S.C. §§ 831, 855, 837, 835, 844, 841 (1964); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961).

[23]Powell v. Alabama, 287 U.S. 45, 60 (1932). See generally Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1 (1958).

time of the Revolution,[24] it was, nevertheless, retained in American court-martial procedure.[25] Indeed, the first Articles of War, enacted by the Continental Congress in 1776,[26] made no reference whatsoever to the assistance of counsel for the accused. The English common law principle of considering the judge as counsel for the accused[27] was reflected in article six of the 1786 Articles of War[28] which placed upon the "judge advocate" the responsibility of not only prosecuting the case, but also of acting as counsel for the accused. As his name implied, he was to be a "judge" and an "advocate."[29] The language of article six was retained in the Articles of War enacted by Congress in 1806,[30] and was repeated almost verbatim in the 1874 Articles.[31] While it was generally permissible during this period for a defense counsel to be present at a military trial, his role was extremely restricted. During the course of the trial, the defense counsel was allowed to advise the accused privately as to how he should conduct his case, but was not permitted to address the tribunal or examine or cross-examine witnesses.[32] Representation of the accused before a court-martial was tolerated as an "indulgence," and defense counsel was looked upon as merely an "amicus curiae."[33] These rules generally persisted until 1920 when Congress made the appointment of defense counsel a requirement in all general and special courts-martial.[34] While this requirement represents a significant gain in the protection of the legal rights of the accused, it is to be noted that there was no corresponding requirement that the defense counsel possess legal training.[35] All officers in the military were regarded as qualified to serve as counsel before courts-martial, and, consequently, servicemen were often represented by nonlawyers.[36] After World War II, Congress undertook an extensive revision of the system of military justice which culminated in the 1950 enactment of the Uniform Code of Military Justice.[37] Under the UCMJ, an accused must be represented by trained lawyers at general courts-martial.[38] However, at special courts-martial, the defendant is entitled to professional counsel only if the prosecutor is

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[24]Powell v. Alabama, 287 U.S. 45, 61 (1932).

[25]Avins, *Accused's Rights to Defense Counsel Before a Military Court*, 42 U. DET. L.J. 21, 24 (1964).

[26]5 JOURNALS OF THE CONTINENTAL CONGRESS 788 (1776).

[27]See 4 BLACKSTONE, COMMENTARIES 355-56.

[28]30 JOURNALS OF THE CONTINENTAL CONGRESS 316 (1786).

[29]United States v. Culp, 14 U.S.C.M.A. 199, 210, 33 C.M.R. 411, 422 (1963).

[30]Act of April 10, 1806, art. 69, 2 Stat. 367.

[31]Act of June 22, 1874, art. 90, 18 Stat. 238.

[32]Avins, *Accused's Right to Defense Counsel Before a Military Court*, 42 U. DET. L.J. 21, 22-25 (1964).

[33]32 GEO. WASH. L. REV. 420 (1963).

[34]Articles of War, art. 11, 41 Stat. 789 (1920).

[35]United States v. Culp, 14 U.S.C.M.A. 199, 212-13, 33 C.M.R. 411, 424-25 (1963).

[36]United States v. Krashouskas, 9 U.S.C.M.A. 607, 609, 26 C.M.R. 387, 389 (1958).

[37]10 U.S.C. §§ 801-940 (1964).

[38]10 U.S.C. § 827(b) (1964).

a lawyer.[39] Nevertheless, special courts martial may impose such severe punishments as confinement for six months, reduction in rank, six month forfeiture of pay, a bad conduct discharge, or any combination thereof.[40] Recently, the Court of Military Appeals, relying upon the traditional due process dichotomy, held that defendants before special courts-martial had no right to legally trained defense counsel since the sixth amendment was not applicable to servicemen, and Congress, having the exclusive power to prescribe the qualifications of counsel before courts-martial, had not bestowed that right upon them.[41] However, unless overturned by higher authority, the decision in the instant case guarantees an accused in a special court-martial the benefit of having his defense conducted by a trained lawyer.

It is apparent that in order for the armed forces to be effectively utilized as an instrument of national defense, servicemen must necessarily be denied certain rights available to civilians.[42] However, due process rights, which are essential to insure that the accused be afforded a "fair trial," in no way interfere with military discipline or the punishment of uniquely military offenses.[43] Nevertheless, for several million men and women in the armed services, the right to due process protection is different from that accorded all other citizens. The due process dichotomy concept, which was the basis for establishing what in effect is a double standard of constitutional rights, might well have had some validity when the military community consisted of hard core mercenaries dwelling in isolated barrack communities. However, to retain this concept in the world of today where the armed forces represents an integral part of American society[44] is an anachronism. It is submitted that the decision in the noted case represents a significant advance in the continuing erosion of the traditionally rigid view of military due process.

Scott Parker Hemleben

Perpetuities—Wait and See Applied in Mississippi

Testatrix died in 1958, leaving as her natural heirs three nephews and two nieces. In her will the testatrix attempted to make a devise in trust in favor of her nieces and nephews and two charities. It was provided in the will that if the charities found the gift more of a liability than an asset, the property was to be sold and the "family" was to be given the right to buy the property. It then provided that the money was to be used for the erection of a monument. In 1964 when petition

[39]See 10 U.S.C. § 827(c) (1964).

[40]See 10 U.S.C. § 819 (1964).

[41]United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[42]Burns v. Wilson, 346 U.S. 137, 140 (1953).

[43]Note, *The Right to Counsel in Special Courts-Martial*, 50 Minn. L. Rev. 147, 156 (1965).

[44]Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225, 254 (1961).

was filed for the construction of the will, the two charities disclaimed any interest and declined any gift under the will. Since the "family" and the "natural heirs" were the same people, these people would take the property regardless of whether the devise violated the Rule Against Perpetuities. The chancery court held the gift over violated the Rule Against Perpetuities. HELD: Affirmed on other grounds. A gift over upon a remote contingency is valid if the contingency actually occurs within the period of the Rule Against Perpetuities. *Phelps v. Shropshire,* 183 So. 2d 158 (Miss. 1966).

The common law Rule Against Perpetuities first emerged in the *Duke of Norfolk's Case*[1] in 1677. The rule, as it is stated today, is that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[2] The traditional view has been that in determining the validity of a future interest the facts existing at the creation of the instrument are the only facts to be considered.[3] If, at that time, it is possible the interest might not vest within the period, it is void, even though the contingency actually occurs within the period.[4] It is this "what might happen" aspect of the common law rule that has brought about both judicial and statutory changes in recent years. The rebellion began in 1891 when the New Hampshire Supreme Court[5] applied the cy pres[6] doctrine to give effect to a limitation which otherwise would have been void for remoteness. Another doctrine which appeared at an early date was that where there are alternative limitations, one of which might be remote while the other is not, the gift is valid where the latter contingency actually happens.[7] In *Sears v. Coolidge*[8] the court applied what they called the "second look" doctrine to powers of appointment in order to avoid the harshness of the common law rule. In 1953 the New Hampshire Supreme Court[9] again modified the common law Rule Against Perpetuities by holding that the validity of future interests would be determined on the basis of events which actually occurred before the termination of preceding estates. Thus emerged judicially a limited form of what has come to be known as the "wait and see" doctrine. This is the view that actual events rather than possible events will be considered in determining whether a contingent interest vests within the period of the Rule Against Perpetuities.[10]

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[1]3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1677).

[2]GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[3]*E.g.*, Proprietors of the Church in Brattle Square v. Grant, 69 Mass. (3 Gray) 142 (1855). See generally SIMES & SMITH, FUTURE INTERESTS § 1228 (2d ed. 1956).

[4]*Ibid.*

[5]Edgerly v. Barker, 66 N.H. 434, 31 Atl. 900 (1891).

[6]"This is the principle that equity will, when a charity is illegal or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as nearly as possible." Mississippi Children's Home Soc'y v. City of Jackson, 230 Miss. 546, 93 So. 2d 483 (1957).

[7]Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867). See generally Annot., 64 A.L.R. 1077 (1930).

[8]329 Mass. 340, 108 N.E.2d 563 (1952).

[9]Merchant Nat'l Bank v. Curtis, 98 N.H. 340, 97 A.2d 207 (1953).

[10]SIMES & SMITH, FUTURE INTERESTS § 1230 (2d ed. 1956).

This doctrine has since been put into effect by statute in Pennsylvania[11] in 1947 and Massachusetts,[12] Connecticut,[13] and Maine[14] in 1955. Maryland[15] in 1960 also enacted a limited "wait and see" doctrine. Vermont[16] in 1957, Washington[17] in 1959, and Kentucky[18] in 1960 enacted wait and see statutes with an added cy pres feature. The cy pres feature calls for the reformation of the disposition to approximate most closely the intentions of the creator of the interest so that it will conform to the limits of the rule. If, after the wait and see doctrine is applied, the interest is still invalid, the cy pres doctrine is then applied so that the disposition will conform to the limits of the rule.

Powell v. Brandon[19] and *Caldwell v. Willis*[20] are leading cases for the proposition that the common law Rule Against Perpetuities is applicable to personal property in Mississippi. There is, however, a state of uncertainty as to when the common law rule will be applied to real property. The main reason for this uncertainty is that Mississippi also has a statutory Rule Against Perpetuities. This statute states that "any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of said successors to any person or any heirs."[21] Shortly after the introduction of the statute in 1930, one writer expressed the opinion that "the only change made by the new statute of the common law rule is the elimination from that rule of the twenty-one year period after the death of some person living when the conveyance or devise is made."[22] In a recent article it was expressed that this is the most reasonable view from a literal reading of the statute.[23] There has been no case, however, in which the statute has been definitely construed. It should also be kept in mind that the "two donee" statute[24] is still in force as to wills written prior to its omission in 1930.[25] In this regard, the court in *Middlesex Banking Co. v. Field*[26] was of the opinion that the "two donee" statute was merely amendatory of the common law rule and not a substitute for it. The first instance in which the Mississippi Supreme Court attempted to modify the common law rule

[11]PA. STAT. ANN. tit. 20, § 301.4 (1950).

[12]MASS. ANN. LAWS ch. 184A, §§ 1-6 (1955).

[13]CONN. GEN. STAT. REV. §§ 45-95 to -99 (1958).

[14]ME. REV. STAT. ANN. ch. 5, §§ 101-106 (1964).

[15]MD. ANN. CODE art. 16, § 197A (Supp. 1965).

[16]VT. STAT. ANN. tit. 27, §§ 501-503 (1959).

[17]WASH. REV. CODE § 11.98.010 (1959).

[18]KY. REV. STAT. § 381.216 (1962).

[19]24 Miss. 343 (1852).

[20]57 Miss. 555 (1880).

[21]MISS. CODE ANN. § 838 (1956).

[22]Holmes, *Some Observations On Statutory Rule Against Perpetuities*, 4 MISS. L.J. 122 (1931).

[23]Custy & Brand, *Future Interests—The Mississippi Two Donee Statute and The Common Law Rule Against Perpetuities*, 30 MISS. L.J. 221 (1959).

[24]MISS. CODE ANN. § 2269 (1917).

[25]See Carter v. Sunray Mid-Continent Oil Co., 231 Miss. 8, 94 So. 2d 624 (1957).

[26]84 Miss. 646, 37 So. 139 (1904).

to avoid its punitive results was in the case of *Carter v. Berry*.[27] The court applied the doctrine of equitable approximation[28] to reduce the age contingency from twenty-five to twenty-one in order to bring the remainder within the period of the common law rule. The court stated in its decision that, "equitable approximation carries out the dominant, primary idea of the testator, and at the same time preserves the policy of the rule against perpetuities."[29]

The instant case is in line with the recent trend in the United States to modify the common law Rule Against Perpetuities. The two principal methods being used today are the "cy pres" doctrine and the "wait and see" doctrine. The court in the instant case relies upon the second of these in order to validate an otherwise invalid gift under the common law Rule Against Perpetuities. The court states that where there is a gift upon a remote contingency, the gift will be valid if the contingency actually occurs within the period of the rule. They label this as the "possibilities" aspect of the rule. The court then proceeds to say that this is analogous to the "wait and see" doctrine. It is submitted that what the court refers to as the "possibilities" aspect of the rule is actually the "wait and see" doctrine and should be stated as such. As most text writers use the term "possibilities" aspect, it simply means that the validity of an interest will be determined in light of the facts existing at the creation of the instrument.[30] To use the term "possibilities" aspect in any other manner will lead only to confusion. Also, the court does not say just how long they will "wait and see" to determine whether an interest is valid. It might be inferred from the decision, however, that the court will wait until the termination of the period of the Rule Against Perpetuities, which would be lives in being and twenty-one years. It seems that the court's adoption of the "wait and see" doctrine will have a very desirous affect upon perpetuities cases in the future. By determining the validity of a disposition by actual events, the court will have additional facts upon which their decision may be based. Thus, the court will be able to circumvent the harshness of the common law rule, yet still uphold the purpose of the rule.

William B. Harvey

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[27]243 Miss. 321, 140 So. 2d 843 (1962).

[28]"[R]ule permitting deviations from the settlor's directions as to mere methods of administration, where the charitable objective is not changed, but rather the means and methods of it are varied. . . ." Mississippi Children's Home Soc'y v. City of Jackson, 230 Miss. 546, 93 So. 2d 483 (1957).

[29]243 Miss. 321, 377, 140 So. 2d 843, 855-56 (1962).

[30]*E.g.*, SIMES & SMITH, FUTURE INTERESTS § 1228 (2d ed. 1956).

PROCEDURE—MODIFICATION OF JUDGMENT AFTER TERM

The trial court entered a judgment of $3,000 for the plaintiff on August 12, 1964. A motion was filed the next day by the plaintiff to correct the judgment. The trial court failed to act upon the motion during the regular term which ended August 15, 1964. Without having extended the term, the trial court, on August 19, 1964, set aside its prior judgment and entered a corrected judgment for $6,004. On appeal the defendant contended the corrected judgment was void because entered during vacation, whereupon the plaintiff filed a motion requesting the trial court to correct its minutes. The trial court granted the motion and entered an order nunc pro tunc extending the regular term of court. HELD: Reversed and remanded. A regular term of court may be extended by statute[1] for a definite period of time if the term is in session, but after the term has adjourned a judgment may not be corrected, nor may an order nunc pro tunc be entered extending the term. *McDaniel Bros. Constr. Co. v. Jordy*, 183 So. 2d 501 (Miss. 1966).

As a general rule, courts have discretionary authority to amend or vacate their own judgments.[2] However, some jurisdictions have held that such authority is lost after the final judgment is rendered.[3] Nevertheless, the fact that the time for appeal has passed does not deprive a court of the right to vacate a judgment.[4] In both federal courts[5] and a majority of state courts, there is discretionary power, upon sufficient cause shown, to amend, correct, or vacate judgments.[6] At common law this principle is applicable if the term has expired.[7] However, there are several exceptions. A judgment wrongfully entered during term time because of clerical errors may be corrected during vacation.[8] If the record is void on its face,[9] if there is a mistake of fact correctable by writ of error coram nobis,[10] or if the judgment is void for lack of jurisdiction, it may be vacated subsequent to the term at which it was rendered.[11] Some states permit amendments after the term upon consent of the parties;[12] others simply estop the parties from objecting to the amended judgment where there is consent.[13] A court is not permitted to enlarge its authority over a judgment by reserving a power to amend it at a later term.[14] One method utilized to correct erroneous judgments after the term is by an order nunc pro tunc.[15] Another method is by

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[1] MISS. CODE ANN. § 1647 (1956).
[2] *E.g.*, Russell v. Foley, 278 Mass. 145, 179 N.E. 619 (1932).
[3] *E.g.*, Amory v. Kelley, 309 Mass. 162, 34 N.E.2d 507 (1941).
[4] Denholm & McKay Co. v. Commissioner, 132 F.2d 243 (1st Cir. 1942).
[5] *E.g.*, United States v. Benz, 282 U.S. 304 (1931).
[6] *E.g.*, Wall v. Snider, 93 Okla. 99, 219 Pac. 671 (1923).
[7] *E.g.*, Concannon v. Blackman, 232 Iowa 722, 6 N.W.2d 116 (1942).
[8] *E.g.*, Wilson v. Town of Hansboro, 99 Miss. 252, 54 So. 845 (1911).
[9] Case v. Smith, 215 Mo. App. 621, 257 S.W. 148 (1923).
[10] Jeude v. Sims, 258 Mo. 26, 166 S.W. 1048 (1914).
[11] *E.g.*, Sweeney v. Tritsch, 151 Ala. 242, 44 So. 184 (1907).
[12] *E.g.*, Orban v. Stelle, 292 Mich. 341, 290 N.W. 821 (1940).
[13] *E.g.*, Steckmesser v. Graham, 10 Wis. 37 (1859).
[14] *E.g.*, Hill v. City of St. Louis, 20 Mo. 584 (1855).
[15] *E.g.*, Turner v. Christy, 50 Mo. 145 (1872).

writ of audita querela, which is a remedial writ asking relief from a judgment based on a defense arising after its rendition.[16] Where the above exceptions will not suffice, many jurisdictions have enacted statutes extending court authority over final judgments beyond that permitted at common law.[17] One state allows its courts to alter judgments thirty days after rendition,[18] and if judgment is by default and upon constructive service of process, it may be set aside within three years by showing good cause[19] or some irregularity.[20] Some states, following the procedural rules in federal court,[21] allow alteration of final judgments because of mistake, surprise, or excusable neglect.[22] One state has gone so far as to permit relief due to a mistake of law.[23]

In Mississippi trial courts have authority to reform decrees and judgments during the term at which they are rendered.[24] This inherent power can be used to make judgments speak the truth.[25] Such authority may be utilized until the expiration of the term at which the decree was rendered.[26] The court's limited power at common law has been expanded by statute.[27] An early enactment by the state legislature permitted a court to proceed with a case until a final determination of the issues could be attained, despite the fact that the time for adjournment of the term had passed.[28] Later the law was amended by specifically providing that a cause being entertained during the term could be carried over and decided after the date for adjournment "without any special order entered. . . ."[29] The amended statute further provided that the term could be extended, if the judge thought it advantageous, with the court having the same power over the extended term as was exercised over the term before it was extended. Before the statute was amended the Mississippi Supreme Court strictly construed it by holding that if the lower court had all the facts before it when a decree was rendered, that decree was final and could not be set aside after the term had expired.[30] However, where a felony was involved, the trial court had an affirmative duty to extend the term so that the accused might receive a final verdict without having to undergo a second trial.[31] The amended statute has also been strictly construed so as not to permit a final decree to be modified during vacation, unless the term at which the judgment was entered was extended for a specified length of time while that term

[16]Harper v. Kean, 11 S. & R. 278, 297 (Pa. 1824).
[17]*E.g.*, WASH. REV. CODE § 4.72.010 (1957).
[18]Mo. R. CIV. P. 75.01.
[19]Osage Investment Co. v. Sigrist, 298 Mo. 139, 250 S.W. 39 (1923).
[20]Mo. R. CIV. P. 74.32.
[21]FED. R. CIV. P. 60(b).
[22]*E.g.*, WIS. STAT. ANN. § 269.46(1) (1957).
[23]Paschong v. Hollenbeck, 13 Wis. 2d 415, 108 N.W.2d 668 (1961).
[24]*E.g.*, McRaven v. McGuire, 17 Miss. (9 S. & M.) 34, 55 (1847).
[25]Turner v. State, 212 Miss. 590, 55 So. 2d 228 (1951).
[26]Crosby v. Robertson, 243 Miss. 420, 137 So. 2d 916 (1962).
[27]See Healy v. Just, 53 Miss. 547 (1876).
[28]Hemingway's Ann. Miss. Code § 729 (1917).
[29]MISS. CODE ANN. § 1647 (1956).
[30]Ledyard v. Henderson, Terry & Co., 46 Miss. 260 (1871).
[31]*E.g.*, Whitten v. State, 61 Miss. 717 (1884).

was in session.[32] However, the judge still retains the power to correct mistakes in judgments during vacation if the mistake is evidenced by papers in the cause,[33] is the mistake of the clerk in entering judgment,[34] or is the result of fraud.[35] Further, the trial court has been allowed to vacate a judgment on a demurrer during vacation.[36] If a judgment has been satisfied, or in some manner discharged, it may not be amended.[37] It is not permissible to enlarge the judgment, after the term, to such an extent as to subject a party to liability who was not originally so subjected.[38] The Mississippi Supreme Court has been emphatic in holding that an application to amend, made after the term, is invalid unless sufficient notice is given to the party adversely affected.[39] This is applicable where the amendment will materially alter the judgment so as to affect injuriously the unnotified party.[40]

There appears to be one basic issue concerning the proposition of modifying judgments after the term at which they are entered. The issue is one of obtaining finality of litigation. If a judgment is permitted to be vacated or modified at the caprice of an attorney or litigant, very few suits would ever be finally resolved. It is contended, however, that this basis of justification is ill-founded. A litigant who receives an unsatisfactory judgment because of a mistake of law is not likely to cease his efforts in the courts merely because the trial judge is prohibited from correcting such an error in vacation. On the contrary, the party suffering because of the mistake will probably seek an appeal, thus prolonging litigation. While the Supreme Court's decision in the instant case is supported by the great weight of case law, it is contended that an affirmation of the trial court's action would have been more desirable and justifiable. The lower court's modification of the judgment might have been upheld on the basis that the legislature intended to vest the lower court with more discretion as is evidenced by statutory changes. It is further submitted that the legislature should assist in correcting an undesirable situation by adopting a statute authorizing trial judges to modify or vacate final decrees and judgments during vacation without the need of specifically extending the term while in session. Perhaps, section 60(b) of the Federal Rules of Civil Procedure might serve as a guide in drafting such legislation. The present procedural remedies cause unnecessary delays and expenses, and force litigants to become entangled in a series of legal technicalities.

Bill P. Joyner

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[32]Perry v. State, 154 Miss. 459, 122 So. 744 (1929).

[33]*E.g.*, Graves v. Fulton, 8 Miss. (7 How.) 592 (1843).

[34]*E.g.*, Wilson v. Town of Hansboro, 99 Miss. 252, 54 So. 845 (1911).

[35]*E.g.*, Harper v. Barnett, 16 So. 533 (Miss. 1895).

[36]Shields v. Taylor, 21 Miss. (13 S. & M.) 127 (1849).

[37]Spring v. Tidwell, 31 Miss. 63 (1856).

[38]Barber v. City of Biloxi, 76 Miss. 578, 25 So. 298 (1898).

[39]*E.g.*, Poole v. McLeod, 9 Miss. (1 S. & M.) 391 (1843).

[40]See Dorsey v. Peirce, 6 Miss. (5 How.) 173 (1840).

RECENT BOOKS

BETTER SETTLEMENTS/THROUGH LEVERAGE. Philip J. Hermann. New York, New York: Aqueduct Books, A Division of the Lawyers Co-operative Publishing Company, 1965. Pp. 369. $9.50.

The title *Better Settlements/Through Leverage* would be misleading to one who would associate the term "leverage" with a force applied directly to an object to gain an advantage, for the author uses the term to offer numerous hints of indirect persuasion and subtle manipulation to put the necessary forces to work to make for better settlements. The author no doubt is using the term "leverage" in its physical sense to mean an advantage gained by pressure or force applied in one direction to cause a greater force to move in the opposite direction, as one moves a boulder by the use of a crowbar. Thus defined, the author discusses the proper application of his "levers" to compel the opponent to move toward a better settlement.

The psychological approach to settlement negotiations is presented within the framework of an ordinary poker hand. The author explains that the difference between a poor player and the successful player is skill. For example, the winning poker player knows the odds, the strategy, and the people against whom he is playing, and gets the most out of the cards he is dealt. In the same way, the skillful attorney-negotiator secures the most advantageous settlements for his clients, and he, too, keeps his eye on the odds, the strategy, and his opponent.

Although the numerous levers or skills discussed in the volume are generally apparent or should be apparent to the practicing attorney, the proper utilization or application of these skills may not be so apparent. The volume is replete with practical examples of the proper application of the numerous hints, and the approach utilizes common sense and the well-known psychology of human conduct.

The author contends that the factor of uncertainty is the most effective lever that one can use to increase or decrease the settlement value of a personal injury case. The author emphasizes that many negotiators allow uncertainly to effect adversely their own position with respect to settlements and do not adequately consider the powerful effect that uncertainty has on the opposing party. This discussion should be particularly reassuring to the young lawyer who may tend to overestimate his own uncertainty and underestimate the uncertainty of the opposing party.

The power of a sound demand is given careful attention. It is recognized that a sound demand or offer adequately documented and properly communicated to the opposing party puts such party "under the gun." In this discussion, the author emphasizes that the pressure to settle a case, to which both plaintiffs and defendants are ordinarily subject is entirely relieved by a grossly exaggerated demand or a grossly underestimated offer.

In the remaining chapters, the leverages of knowledge, technique, salesmanship, litigation, competency, etc. offer informative subtle hints

which should be of value to any attorney and adjustor. With these hints are intertwined the numerous psychological factors which in the final analysis play such a large part in the settlement of any case.

In addition to the author's numerous suggestions as to how one concerned with a claim or suit may quickly obtain a settlement, he has gone further and made a penetrating study of the economics of settlement by compiling and studying numerous personal injury cases and making various comparisons of the economics of settlement versus trial from both the plaintiff's and the defendant's standpoints. From these facts, the author points out some of the economic factors which should be considered by both plaintiff and defendant and their counsel. He has concluded that the trial of personal injury cases, insofar as the plaintiff's attorney is concerned, is, as a matter of economics, doubtful, and has analyzed that fewer than three out of ten cases tried to verdict can possibly be profitable to the plaintiff's attorney.

This is a practical work. The author supplements each "lever" with numerous examples of the practical application of that "lever." Although the emotional and psychological factors of negotiation and settlement are carefully considered, the author has provided his readers with valuable statistical and research data to fortify his conclusions. Bill Colson of the Florida Bar probably best summarized the value of this work when he stated in the "Foreword" that "your client can't afford *not* to have you read this book."

Alex A. Alston, Jr.
Wells, Thomas & Wells
Jackson, Mississippi

STATE ADMINISTRATIVE LAW. Frank E. Cooper. Indianapolis. Indiana: The Bobbs-Merrill Company, Inc., 1965. 2 Vols. Pp. 951. $35.00.

The regular or occasional practitioner of state administrative law should have this treatise within reach. He will find it to be an indispensable time saver when the answer to practically any problem of administrative procedure is needed.

Presented in this two volume set is a comprehensive summary and analysis of statutory and case law relating to problems of administrative procedure. Professor Cooper has combined years of experience and an unusual talent for research and writing to produce a useful addition to the practicing lawyer's library, while at the same time providing a thorough and all-inclusive reference work which will be even more helpful to legislators and others interested in the statutory improvement of state administrative practice. It may well be that the author's primary target is the legislator, whose knowledgeable support is necessary for the enactment of improving legislation. The reader is given the impression that the emphasis is in this direction.

In the first chapter, Professor Cooper relates the growth of administrative law and describes the proliferation of state agencies, boards, and commissions. His "conservative" estimate is that more than 2,000 such bodies are performing legislative and judicial functions largely inde-

pendent of the legislatures and the courts. Lest the reader doubt the importance of the decisions handed down by these administrative bodies, the author suggests that consideration be given to the fact that a single decision by a public service commission approving a rate increase for an electric or telephone utility, or by a state tax commission affecting methods of fixing property values for purposes of *ad valorem* taxation, may have larger consequences, in terms of the money involved, than all of the decisions rendered by the state supreme court in an entire year.

Having made his point as to the pervasiveness and impact of administrative agencies and their rulings, *i.e.*, that the personal life of every citizen is affected thereby, the author then explains that a multiplicity of rules and procedural standards have been promulgated by the various state agencies, and that these rules are not always readily accessible to the lawyer. How much simpler, he asks, to have all of the procedural rules applicable to all state agencies as near as your state statutes? Professor Cooper thus makes a convincing argument for the adoption of the Model State Administrative Procedure Act, the Revised Model State Administrative Procedure Act, or similar statutes.

Throughout the treatise, the reader is enlightened by the findings of Professor Cooper's exhaustive research and his cogent analyses on subjects ranging from the proper separation and delegation of powers, through the step-by-step chronology of an administrative hearing, to procedures available following final order. The author compares administrative law and procedures in states where Model Acts and variations thereof have been adopted and states, such as Mississippi, in which there are no administrative procedural rules except those which have been promulgated by various agencies.

Footnoting is extensive, and the list of cases cited is voluminous, covering some fifty-five pages in the back of volume two. It is mute testimony to the completeness of Professor Cooper's research.

This writer found immediate practical use for the treatise when a question arose as to how best to handle a conflict-of-interest situation which arose concerning a member of an administrative body. Not only had the author covered the subject of conflicts thoroughly in this fine work, but he had also thoughtfully provided several very helpful citations on the question.

Grave constitutional issues may arise where substantial property rights are adjudicated by quasi-judicial administrative bodies composed of appointees with non-legal backgrounds. Especially is this true, says the author, where neither of the Model Acts nor some similar enactment is in effect. The lawyer who encounters a difficult constitutional issue, such as whether reasonable notice has been given in a contested case, will find in this treatise an in-depth study of the problem, the same kind of treatment given all other areas of administrative law discussed in this comprehensive work.

There is not sufficient time or space here with which to do justice to Professor Frank E. Cooper's valuable contribution to the field of administrative law. Suffice it to say that this product of his efforts will prove to be of lasting value, both to legislators and others who will draw upon this treatise for the statutory improvement of state administrative procedure, and to the lawyer who can become a more effective

administrative practitioner by availing himself of Professor Cooper's expertise.

Raymond L. Brown
Colmer, Megehee,
Colmer & Brown
Pascagoula, Mississippi

Book Notes

THE DOCTOR AS A WITNESS. William J. Curran. Buffalo, N.Y.: Dennis & Co., Inc., 1965. Pp. 196. $5.75.

This book is a revision of an earlier book of the same title by Tracy. The author, who is Professor of Legal Medicine and Director of the Law Medicine Institute at Boston University, underscores the problems confronting the doctor-witnesses and demonstrates by practical examples how to cope with them. The book deals with such topics as the doctor's privileges and obligations, compensation, the role of the medical expert, malpractice actions, and rules of evidence.

Books Received

BID FOR FREEDOM: U.S.S.R. VS. TARASOU. C. L. Sareen. Englewood Cliffs, N. J.: Prentice Hall, Inc., 1966. Pp. 199. $3.95.

MORALITY AND THE LAW. Samuel Enoch Stumpf. Nashville, Tenn.: Vanderbilt University Press, 1966. Pp. 247. $5.00.

THE INNS OF COURT. Cornelius Comegys. Buffalo, N. Y.: Dennis & Co., Inc., 1960. Pp. 130. $3.00.

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